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October Term, 2000

IN THE SUPREME COURT OF THE UNITED STATES

WESLEY AARON SHAFER, JR.,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED

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Whether petitioner's due process rights under Simmons v. South Carolina, 512 U.S. 154 (1994), were violated by the trial court's refusal to instruct the sentencing jury that "under South Carolina law, [petitioner] would be ineligible for parole if the jury were to vote for a life sentence," Ramdass v. Angelone, 120 S.Ct. 2113, 2119 (2000) (plurality opinion), and by the South Carolina Supreme Court's holding that Simmons no longer applies to South Carolina's capital sentencing scheme.

2.

Whether prosecutors' capital sentencing arguments based on general deterrence violate due process when state law immunizes them from evidentiary rebuttal.

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Respondent, State of South Carolina, hereby makes a Brief in Opposition to the Petition for a Writ of Certiorari to the South Carolina Supreme Court filed by Wesley Aaron Shafer, Jr., who has been convicted in the South Carolina courts and sentenced to death. Respondent would show this Court the following:

CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina is as of the date of this Brief not yet reported in the South Carolina or Southeastern Reporters. The opinion is reprinted and attached to this Brief as Appendix A, and also is available on WESTLAW as State v. Shafer, Op. No. 25120, 2000 W.L. 576189 (S.C. filed May 8th, 2000). Also reprinted in the Appendix to this Brief is State v. Starnes, Op. No. 25119, 2000 W.L. 576191 (S.C. filed May 8th, 2000). Starnes is a companion case to Shafer which also decided the same issue pursuant to Simmons v. South Carolina, 512 U.S. 154 (1994).

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on May 8th, 2000. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257, Petitioner having asserted below, and asserting herein, deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. The Fourteenth Amendment to the United States Constitution, which forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

2. Section 16-3-20 of the Code of Laws of South Carolina, which is reprinted in

the Appendix to this Brief.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, Wesley Aaron Shafer, Jr., is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Union County. In May 1997, the Union County Grand Jury indicted Appellant Wesley Aaron Shafer for murder, attempted armed robbery and conspiracy. Specifically, the murder indictment alleged that, on April 13, 1997, Appellant shot Ray Broome in the head with malice aforethought. The state made notice of intent to seek the death penalty, and served notice of evidence in aggravation.

Appellant was represented at trial by Public Defender William All, as well as Attorneys Leon Banks and William Nettles. The state was represented at trial by Solicitor Thomas E. Pope, Deputy Solicitor Kevin S. Brackett, and Assistant Solicitor Betty Miller. Judge John C. Hayes conducted a jury trial in Union County beginning on January 12, 1998. On January 18, 1998, the trial jury convicted appellant of all charges.

The sentencing hearing began the next day. After presentation of the evidence, the trial judge charged the following statutory aggravating factor:

> A murder was committed while in the commission of an attempted armed robbery while armed with a deadly weapon.

The judge charged the following statutory mitigating circumstances:

> 1. The defendant has no significant history of a prior criminal conviction involving the use of violence against another person.
>
> 2. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> 3. The capacity of the defendant to appreciate the criminality of his conduct,

or to conform his conduct to the requirement of the law was substantially impaired.

4. The age and mentality of the defendant at the time of the crime.

The judge also instructed the jury that it could consider non-statutory mitigating circumstances supported by the evidence.

On January 21, 1998, the jury found the aggravating circumstance and recommended that Appellant be sentenced to death for the murder. The trial judge imposed the death sentence the same day, along with consecutive sentences of twenty and five years for the attempted armed robbery and conspiracy charges respectively.

Appellant timely filed notice of appeal. In the direct appeal to the South Carolina Supreme Court, Petitioner was represented by David I. Bruck, Esquire. Assistant Attorney General S. Creighton Waters, Esquire, represented Respondent. Both parties filed briefs in the appeal, and the following issues were presented by Petitioner:

I. The trial court's incomplete and misleading response to the jury's question about parole eligibility renders his death sentence fundamentally unfair.

II. The trial court's refusal to allow Appellant to present evidence to rebut the prosecution's argument concerning the supposed general deterrent effect of the death penalty, together with the denial of a curative instruction, denied Appellant due process of law.

III. The trial court erred in granting the state's request for a blanket prohibition of all religious or biblical references during defense counsel's sentencing phase closing arguments.

The South Carolina Supreme Court heard oral argument on October 7th, 1999, and the court issued its opinion affirming Petitioner's conviction and sentence on May 8th, 2000. State v. Shafer, Op. No. 25120, 2000 W.L. 576189 (S.C. filed May 8th, 2000). On May 24th, 2000, Attorney Bruck filed on behalf of Petitioner a "Consent Motion for Stay of Execution".

The South Carolina Supreme Court on June 6th, 2000 granted the motion for stay of execution but denied Petitioner's motion to stay the Remittitur. The Remittitur was sent down on June 6th, 2000.

Petitioner filed his Petition for Writ of Certiorari with the United States Supreme Court on July 14th, 2000, and this Petition was docketed on July 20th, 2000.

RESPONDENT'S STATEMENT OF FACTS

Although the defense did argue against the presence of malice at trial, it is undisputed that Petitioner Wesley Shafer killed Ray Broome by shooting him twice in the head. The issues in this appeal only challenge the sentencing phase. The following briefly describes the evidence presented at trial.

Adam Mullinax, Shafer's cousin and a co-defendant, spent most of Saturday, April 12th, 1997, with Shafer and Justin Porter. **{R. 1161 ll. 18-63; 1154 l. 1 - 1159 l. 11}**. Mullinax testified that Shafer, who was wearing a Duke University jacket, showed off a pistol he kept in the jacket's outside pocket. **{R. 1159 l. 21 - 1161 l. 23}**. At about 7 p.m., Mullinax left Porter and Shafer and went to watch boxing. **{R. 1159 ll. 11-20; 1162 l. 17 - 1163 l. 12}**.

Later that Saturday night, a number of teenagers and young adults were "cruising" in the parking lot at the Hot Spot convenience store, a popular late-night hangout in Lockhart, South Carolina. **{R. 990 ll. 1 - 25; 1017 l. 18 - 1018 l. 12; 1024 l. 14 - 1025 l. 2}**. Ray Broome, the victim, was the third shift clerk at the Hot Spot. **{R. 941 ll. 13-20}**. Around 11:30 p.m., two men in a brown late-70's Ford pickup attracted attention by spinning the truck's wheels at the gas pumps. Jamie Gibson, who was hanging out at the

Hot Spot, recognized Justin Porter as the driver. The passenger, who Gibson did not know, was wearing a Duke University hooded jacket. After Porter and his passenger went in the store, those hanging out at the Hot Spot saw the two men again spin the truck's wheels while leaving. As the truck pulled away from the store, the passenger held his arm out of the window and fired several shots into the air with a handgun. **{R. 962 ll. 2-10; 990 l.17 - 996 l.10; 1011 l. 6 - 1013 l. 19; 1020 ll. 1-24; 1025 l. 3 - 1026 l. 11; 1039 l. 2 - 1040 l. 20; 1045 ll. 1-17; 1047 l. 7 - 1048 l. 11}**

At about midnight, Mullinax again met up with Porter and Shafer, and after the three drank a few beers, they decided to go to the Hot Spot for cigarettes. Upon arrival, Mullinax used the restroom in the store and returned outside to the Ford pickup. Shafer then pulled the hood on his head, and he and Porter entered the store around at about 1:00 a.m. **{R. 996 l. 22 - 1000 l. 10; 1013 ll. 10-19; 1162 l. 23 - 1168 l. 13}**.

What happened next was entirely captured on a video recorders hooked to the Hot Spot's security cameras. The videotape introduced at trial reflects Shafer walk in and shoot Broome in the head with a startling lack of warning. Eight seconds later, Shafer strolled over to the counter, leaned over it, and put another bullet into Broome's head as he lay on the floor. After attempting and failing to open the cash register, Shafer and Porter ran out the door. **{R. 963 l. 5 - 965 l. 11; 1168 l. 15 - 1170 l. 8}**.

Once back at the truck, Shafer jumped in the middle of the seat and ducked his head down on Mullinax's lap. While standing at the truck's door, Porter pulled a hat onto his head, fumbled around looking for the keys, and then started the truck and drove away. **{R. 1028 l. 4 - 1031 l. 3; 1041 l. 9 - 1043 l. 23; 1048 ll. 12-23; 1170 l. 9 - 1171 l. 11}**.

Meanwhile, Jamie Palmer, Monica Inman, and Jennifer Martin had pulled into the Hot Spot parking lot in time to watch Shafer and Porter run to the truck and escape. Although her friends were apprehensive, Palmer went inside the Hot Spot and found Broome lying on the floor behind the counter. She promptly dialed 911. While she was on the phone, her friends came inside and begged her to leave, saying, "They might come back, they might come back." **{R. 965 l.10; 1028 l. 4 - 1032 l. 20}**. Although Broome was still breathing when law enforcement and EMS arrived, emergency room personnel could not save him. **{R. 941 l. 21 - 943 l. 1; 975 l. 13 - 976 l. 16; 1503 l. 1 - 1506 l. 9; 1507 l. 12 - 1508 l. 9; 1511 l. 21-25}**.

After escaping from the Hot Spot, Shafer, Porter, and Mullinax returned to Porter's house. While Shafer was confident they would not be caught, he stated they need to get rid of their clothes. Shafer and Porter wrapped the murder weapon, which belonged to Shafer's father, in Mullinax's shirt and hid it under the seat in an old car behind the barn. The two then weighted Shafer's Duke University jacket with a rock, and put it into a nearby creek with their shirts and hats stuffed in the pockets. **{R. 1171 l. 5 - 1174 l. 4; 1108 l. 12 - 1110 l. 18; 1130 l. 15 - 1136 l. 2}**.

The girlfriend of one of the responding deputies was the cousin of Porter, and she and Jamie Palmer had a conversation the night of the incident. **{R. 977 l. 11 - 979 l. 9}**. As a result of this conversation, the police drove Palmer and Inman by Porter's house Sunday morning. The young women identified the Ford pickup parked in Porter's yard as the one involved in the incident. **{R. 979 l. 13 - 980 l. 25; 984 l. 13 - 987 l. 14; 1033 l. 20 - 1037 l. 14; 1053 l. 4 - 1059 l. 1}**.

The trail inevitably led to Shafer, and he was arrested that day. **{R. 1059 l. 2 - 1073 l. 1; 1079 l. 2 - 1102 l. 13}**. After initially denying knowledge of the gun's whereabouts, Shafer ultimately told officers where it was hidden. He also directed them to the location of the hidden jacket and a box of bullets. **{R. 1104 l. 3 - 1105 l. 1; 1108 l. 12 - 1110 l. 18; 1118 ll. 4-23; 1121 ll. 15-20; 1124 l. 7 - 1125 l. 9; }**. When asked by law enforcement why he shot Broome, Shafer replied that he had the gun and "just snapped." **{R. 1120 ll. 7-25; 1122 ll. 1-24; 1125 l. 23 - 1126 l. 7}**.

During the sentencing phase, the state introduced evidence that on October 9th, 1995, Shafer pled guilty to criminal sexual conduct with a minor 2nd and burglary 2nd. Shafer was part of a group of guys who broke into an empty mobile home and pressured, but did not force, two 12-year old girls to engage in sexual activity with them. Shafer did not always comply with the terms and conditions of his probation and home detention from that incident. **{R. 1446 l. 3 - 1455 l. 6}**. During that time he tested positive for marijuana, had another burglary 2nd charge, and was charged with driving under suspension and operating an uninsured vehicle. **{R. 1482 l. 1 - 1484 l. 14; 1488 ll. 5-17}**.

While in jail awaiting trial, prison staff caught Shafer with contraband, including a green leafy substance as well as cigarettes and a lighter. **{R. 1460 l. 3 - 1464 l. 22; 1478 l. 7 - 1480 l. 15}**. Shafer also was charged with simple assault after he angrily confronted a prison guard who turned off the outside phones at the end of recreation period. **{R. 1466 l. 12 - 1471 l. 17}**.

Robert Newton, who was in county jail with Shafer, testified that when Shafer told him about shooting Broome he did not seem bothered by it. According to Newton, Shafer

said that when Broome saw Shafer pointing the gun at him, he just looked back down at a clipboard. Shafer took this as a "smart comment", and fired the pistol. **{R. 1490 l. 5 - 1493 l. 13}**.

The state also presented testimony from various emergency personnel about the unsuccessful efforts to save Broome and the gut-wrenching ordeal of informing his family. **{R. 1502 l. 17 - 1514 l. 20}**. Broome's wife and son also testified about their loss. **{R. 1551 l. 9 - 1576 l. 24}**.

In mitigation, Shafer presented relatives and neighbors who generally testified about mental and physical abuse Shafer and his sister suffered at the hands of their father, Ricky. **{R. 1577 l. 19 - 1609 l. 25; 1650 l. 1 - 1680 l. 13; 1789 l. 1 - 1808 l. 10; 1850 l. 16 - 1861 l. 25}**. Dr. Patrick Goldsmith, a psychologist, testified about Shafer's alleged abuse, substance use, and resulting impulse control problems. He diagnosed Shafer with depression, and felt there was a "probability" he suffered post traumatic stress disorder in early childhood. **{R. 1615 l. 17 - 1644 l. 10}**.

Also testifying for Shafer was Lt. Col. David Grossman, who has a master's degree in psychology and who is the self-anointed founder of the discipline of "killology". Grossman theorized that years of abuse, watching violent movies, and playing violent video games had conditioned Shafer much in the "stimulus-response" manner which the military uses to train soldiers to kill the enemy. Thus, he generally asserted that Shafer had a "conditioned response" where if a target such as Broome presented himself, it would be "extraordinarily difficult" for Shafer not to shoot. **{R. 1681 l. 23 - 1786 l. 19}**.

In reply, the state presented testimony about one of the video games played by

Shafer and discussed by Grossman. The witness stated that although a player got points by shooting bad guys, the player lost a life if he shot the "innocent townsfolk." **{R. 1865 l. 6 - 1870 l. 20}**.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. Since under South Carolina's sentencing scheme there was legally available to Petitioner a definite term sentence as an alternative to death and life without parole, the South Carolina Supreme Court properly ruled that Simmons v. South Carolina was not triggered; in any event, the state did not rely on Petitioner's future dangerousness.

The statutory possibility that Appellant could have received a 30-year mandatory minimum sentence precludes the claim that the trial judge should have charged the sentencing jury that Appellant would get life without parole ["LWOP"] if the jury did not recommend death. In the alternative, the rule in Simmons v. South Carolina was not triggered because the prosecution did not rely on Petitioner's future dangerousness.

A. How the federal question was raised and decided below

1. Events at trial

At trial, the state sought an *in liminie* motion that parole ineligibility could not be mentioned under Simmons v. South Carolina because the state had not made future dangerousness at issue. Defense counsel first argued that the state could not use evidence of Appellant's character without using it for future dangerousness. The court found that as of yet, future dangerousness had not been argued, so he granted the state's motion. **{R. 1817 l. 17 - 1821 l. 9}**.

After the court indicated that it was charging what it thought was applicable from the murder statute, the defense made a motion to read from section 16-3-20. The court

denied this motion. The court granted the defense's request to charge life in prison means "until death of the offender." See S.C. Code Ann. § 16-3-20 (Supp. 1998). **{R. 1836 l. 14 - 1843 l. 15}**.

After the solicitor's sentencing phase closing argument, the defense argued that under Simmons future dangerousness was raised when the solicitor echoed the statement of one of those who found the victim, that "they might come back, they might come back." The solicitor stated he was merely arguing general deterrence, and the court agreed. **{R. 1893 l. 23 - 1894 l. 10}**.

The trial court then charged the jury as follows:

> THE COURT: I tell you that life imprisonment means until death of the defendant.
>
> * * *
>
> In deciding whether to sentence the defendant to death or life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death.

{R. 1919 ll. 15-16; 1926 ll. 12-15}.

Finally, during deliberation the jury sent a note asking the following two questions:

> (1) Is there any remote chance for someone convicted of murder to become eligible for parole?
>
> (2) Under what conditions would someone convicted for murder be eligible?

The state argued that under the Simmons v. South Carolina and its progeny, parole ineligibility does not need to be charged even if someone is parole ineligible, unless future dangerousness is argued. In response, defense counsel admitted that the "until death of the offender" language was an appropriate "baseline," and stipulated that the second question could not be answered. The defense further contended that since section 16-3-20 explained life imprisonment beyond "until death of the offender," then it should be

charged to the jury. Asserting that under the present 16-3-20 there are three clear options for the jury, the defense stated that it thought the jury should be charged that if they find an aggravator, Appellant would receive life without parole. Finally, Appellant argued that the judge should not include "parole eligibility is not for your consideration" in its response to the jury's question. The trial court ultimately charged the following:

> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, quote, for the purposes of this section life imprisonment means until the death of the offender, end quote.
>
> Parole eligibility or ineligibility is not for your consideration.

{R. 1937 l. 22 - 1954 l. 13}.

2. The direct appeal to the South Carolina Supreme Court

In State v. Shafer, the South Carolina Supreme Court addressed the due process claim for a parole ineligibility charge as follows:

> Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends Simmons mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.
>
> When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. [Simmons v. South Carolina]; State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society." Simmons, 512 U.S. at 165 (1994) (plurality opinion).
>
> Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp.1998). Under the new sentencing scheme, a defendant can be sentenced to (1) death, (2) life without the possibility of parole, or (3) a mandatory minimum thirty year

> sentence. We recently held Simmons is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. State v. Starnes, Op. No. 25119 (S.C.Sup.Ct. filed May 8, 2000) (Shearouse Adv.Sh. No. 18 at 17). [FN7]
>
> [FN7] In Starnes, we suggested, under the terms of the statute, it is arguable that a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.
>
> Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.
>
> Appellant argues Simmons mandates a charge on parole ineligibility when the State argues future dangerousness and the jury's sentencing recommendation is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read Simmons so narrowly. By its own terms, Simmons requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is legally available to the defendant. Simmons, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole...".) (emphasis added). This interpretation is supported by decisions from other jurisdictions. Ramdass v. Angelone, 187 F.3d 396 (4th Cir.1999) (Simmons is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); United States v. Flores, 63 F.3d 1342 (5th Cir.1995), cert. denied, 519 U.S. 825, 117 S.Ct. 87, 136 L.Ed.2d 43 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and, therefore Simmons is inapplicable); Allridge v. Scott, 41 F.3d 213 (5th Cir.1994), cert. denied, 514 U.S. 1108, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995) (Simmons applies where capital defendant is ineligible for parole as a matter of law; Simmons does not apply even if it is unlikely defendant would be paroled); People v. Simpson, 172 Ill.2d 117, 216 Ill.Dec. 671, 665 N.E.2d 1228 (Ill.), cert. denied, 519 U.S. 982, 117 S.Ct. 436, 136 L.Ed.2d 334 (1996) (Simmons inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (N.C.1995), cert. denied, 516 U.S. 1133, 116 S.Ct. 956, 133 L.Ed.2d 879 (1996) (Simmons inapplicable where alternative to death is not life imprisonment without possibility of

> parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, Simmons was inapplicable.

State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *4-*5 (S.C. filed May 8th, 2000).

The Shafer court next ruled that Petitioner's Eighth Amendment claim for a parole ineligibility charge was not preserved for appeal. In the alternative, Shafer found a parole ineligibility charge was not required "mitigating evidence" under Skipper v. South Carolina, 476 U.S. 1 (1986), and, as a matter of state law, parole ineligibility "remain[ed] an irrelevant factor which the jury should not consider". State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *5-*6 (S.C. filed May 8th, 2000).

Shafer also addressed Petitioner's state law bases for his claim that after the jury's question the trial court should have charged Petitioner was parole ineligible. Shafer first noted that absent a Simmons issue, a jury's inquiry about parole should be handled in accordance with State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), which requires: (1) a charge that death and life imprisonment should be understood in their plain and ordinary meaning, and (2) a charge that parole eligibility should not be considered. State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *6 (S.C. filed May 8th, 2000). The court reiterated that Petitioner could possibly receive one of three possible sentences at the time of sentencing, and recognized that the jury's question meant it "was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment". Id. at *6. Thus, the court concluded:

> Informing the jury that appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

Id.

Next, Shafer rejected Petitioner's claim that parole eligibility was suggested by the judge's charge, "parole eligibility or ineligibility is not for your consideration". The court noted that unlike the charges in Simmons, this instruction "specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole eligible". State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *6 (S.C. filed May 8th, 2000).

Finally, Shafer disagreed with Petitioner's contention that portions of the sentencing statute highlighted below be read to the jury to define life imprisonment, because: (1) the Court had determined parole eligibility or ineligibility were not proper considerations for the jury, and (2) "the highlighted text provides the jury with only those portions Petitioner deems favorable but excludes any reference to other less favorable sentencing options". State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *6 (S.C. filed May 8th, 2000).

In State v. Starnes, the companion case to Shafer, the court discussed with more detail its rejection of a similar Simmons claim. State v. Starnes, Op. No. 25119, 2000 W.L. 576191 (S.C. filed May 8th, 2000). Starnes concluded that "the rationale for Simmons simply does not exist when there is a potential mandatory minimum thirty year sentence", because unlike a sentence of LWOP, "a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society". Starnes, Op. No. 25119, 2000 W.L. 576191, *9.

Finally, Starnes rejected the claim that the jury, after just convicting the defendant of two murders, therefore necessarily was going to find the aggravating factor that "two or more persons were murdered by the defendant by one act or pursuant to one scheme or

course of conduct". The court found it "inappropriate to assume the jury would find an aggravating circumstance" beyond a reasonable doubt, and thus concluded that "a potential mandatory minimum thirty year sentence existed" precluding the need for a parole ineligibility charge. Id. at *9.

B. Unlike the South Carolina's old sentencing scheme addressed in Simmons v. South Carolina, which provided for parole eligibility for murderers sentenced to life, the sentencing scheme under which Petitioner was tried provided for three options: death, life without parole, and a mandatory minimum sentence of at least thirty years.

The statutory possibility that Petitioner could have received a 30-year mandatory minimum sentence precludes the claim that the trial judge should have charged the sentencing jury that Appellant would get life without parole ["LWOP"] if the jury did not recommend death.

Previously, Simmons issues arose in the context of the old South Carolina penalty scheme for capital murder cases. Under the old law, if the jury found no aggravating factors in the penalty phase, the defendant received life in prison with a 20-year parole eligibility. If the jury found aggravating circumstances but did not recommend the death penalty, the defendant received life with a 30-year parole eligibility. See S.C. Code Ann. § 16-3-20 (Supp. 1995).

In Simmons itself, the defendant pled guilty to a number of violent crimes prior to his death penalty trial. Therefore, regardless of whether the jury found aggravating circumstances, Simmons was ineligible for parole under South Carolina's section 24-21-640, because that section precludes parole for those with a second conviction for a violent crime. See 512 U.S. at 156. The trial court prevented Simmons from mentioning parole

during *voir dire*, and denied the defense's request for a LWOP charge. 512 U.S. 159-61. During closing, the solicitor argued future dangerousness as a justification for imposition of the death penalty on Simmons. 512 U.S. at 157, 176. After the jury inquired of the judge whether a life sentence carried the possibility of parole, the judge gave a charge that (1) death and life imprisonment should be considered in their plain and ordinary meaning, and (2) parole eligibility was not for the jury's consideration. The jury then returned a death sentence. 512 U.S. at 160.

Both the plurality and concurring opinions in Simmons first recognized that states still retain discretion in determining whether parole eligibility is an appropriate consideration for the sentencing jury. 512 U.S. at 168, 176 (both opinions citing California v. Ramos, 463 U.S. 992 (1983)). However, Simmons held that due process prevented the state from creating "a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. at 171. Simmons has thus been read to establish a two-part test for triggering of its mandate:

(1) the state must the defendant's future dangerousness at issue in the trial, and

(2) *"the only available alternative sentence to the death penalty is [LWOP]."*

See Simmons, 512 U.S. at 169 (plurality opinion); 512 U.S. at 177 (concurring opinion).

The present penalty scheme for capital murder is different from the one at issue when Simmons was decided. Under the present South Carolina Code section 16-2-30, if the jury in a capital case fails to find any aggravating circumstances, the trial court has discretion to sentence the defendant to either a mandatory minimum term of 30 years, or LWOP. Pursuant to sections 24-13-100 and -125, no part of the finite term sentence can

be reduced by parole. If the murder defendant had at least one prior conviction of a "most serious offense," then the defendant **must** be sentenced to life without parole. S.C. Code Ann. § 17-25-45 (Supp. 1997). If the defendant has at least two prior convictions of a "serious offense," then solicitors in their discretion could seek a LWOP sentence. S.C. Code Ann. § 17-25-45 (Supp. 1997).[1]

If, on the other hand, the jury finds aggravating circumstances but does not recommend a death sentence, then the trial court must sentence the defendant to LWOP. Of course, the jury can recommend a death sentence only if it finds aggravating factors. S.C. Code Ann. § 16-3-20 (Supp. 1997).

C. This Court's recent decision in Ramdass v. Angelone.

Brief review of this Court's decision in Ramdass v. Angelone is necessary to address the issues raised by Petitioner. In Ramdass, this Court reviewed in federal habeas corpus a capital murder defendant's claim that he was entitled to a parole ineligibility charge because of his ineligibility under the state's "three-strikes" law. At the time of his capital sentencing proceeding, Ramdass had been convicted of a qualifying prior crime, but the judge had not entered a final judgment of conviction as required by state law. During the capital sentencing proceeding, the jurors inquired about the availability of parole, but the trial court told them they "are not to concern [them]selves with what may happen afterwards". 120 S.Ct. 2113, 2117-20 (2000).

The Ramdass plurality made a number of points in rejecting the claim for a

[1] A murder defendant sentenced to LWOP under section 17-25-45 could still get a pardon for geriatric, health, or other extraordinary reasons. S.C. Code Ann. § 17-25-45(E) (Supp. 1997).

Simmons parole ineligibility charge:

> (1) "States have some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case, subject to the rule of Simmons." Ramdass, 120 S.Ct. at 2119, 2121.
>
> (2) Simmons has not been "extended to cases where parole ineligibility has not been established as a matter of state law *at the time of the jury's future dangerousness deliberations in a capital case*." Ramdass, 120 S.Ct. at 2119 (emphasis added).
>
> (3) A Simmons instruction is not required unless it is legally accurate, and in Simmons, the defendant had "conclusively established" his parole eligibility *at the time of sentencing*. Ramdass, 120 S.Ct. at 2120 (emphasis added).
>
> (4) A "functional approach", under which the court would attempt to "evaluate the probability of future events", is "neither necessary nor workable" under Simmons. Ramdass, 120 S.Ct. at 2121.
>
> (5) A parole ineligibility charge is of "uncertain materiality", and can be overcome if a jury concludes the defendant may escape, be pardoned, benefit from a change in state laws, or be dangerous to society in prison. Thus, the Virginia state courts had "good reason not to extend Simmons beyond the circumstances of that case". Ramdass, 120 S.Ct. at 2122.

The plurality rejected Ramdass's claim because his parole ineligibility was not conclusively established under state law. It refused to engage in a "functional approach" and predict that Ramdass would inevitably become parole ineligible, and found that entry of judgment was not a mere ministerial act, in part because of the availability of post-trial motions. 120 S.Ct. at 2119-26.

Justice O'Connor concurred with the Ramdass plurality. After noting the more restrictive federal habeas corpus scope of review, she concluded: (1) the Court looks to state law to determine parole eligibility, (2) while the defendant in Simmons "conclusively established" his parole ineligibility, Ramdass had not, (3) the entry of judgment requirement under state law was not ministerial, or inevitable foreordained under state law, and (4)

Simmons does not require state courts to estimate the likelihood of future contingencies. Thus, Justice O'Connor reasoned that LWOP was not the "only available alternative" to death, and Simmons was inapplicable. Ramdass, 120 S.Ct. at 2126-28.

D. Since no other statutory provision required that Petitioner be sentenced to life without parole if not sentenced to death, then Petitioner could have received as little as a definite term sentence of thirty years; thus, life without parole was not the only available alternative sentence, and Simmons was inapplicable.

Since there was legally available to Petitioner a potential alternative sentence to death other than LWOP, that prong of Simmons is not met. The LWOP provisions in section 17-25-45 were not triggered in this case. **{R. 1940 ll. 21-25; 1949 ll. 15-21}**. Thus, depending on the findings of the jury on the sentencing phase, Appellant faced three possible sentencing alternatives: 30 years, LWOP, or death.

South Carolina and other jurisdictions in interpreting Simmons have held that it does not apply, even if the solicitor argues future dangerousness, *unless the only other alternative to a death sentence is life without the possibility of parole*. See, e.g. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997); State v. Williams, 321 S.C. 327, 337, 468 S.E.2d 626, 632 (1996). See also State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996), cert. denied, 520 U.S. 1277 (1997). These cases were decided under the old South Carolina scheme, where a life sentence had various terms before parole eligibility unless the defendant had a LWOP-qualifying prior record. See also People v. Simpson, 665 N.E.2d 1228 (Ill. 1996); State v. Chapman, 464 S.E.2d 661 (N.C. 1995); Smith v. State, 898 S.W.2d 838 (Tex. Crim. App. 1995). While this case involves different circumstances, the fact remains that Appellant had a sentencing alternative other than death or LWOP.

Petitioner asserts that the South Carolina Supreme Court took the "only available alternative to death" language out of context in Justice O'Connor's concurring opinion and mistook it for the holding of Simmons. Petition for Certiorari p. 16. Petitioner is incorrect. Both the plurality in Simmons and Ramdass used or recognized the "alternative sentence" language. Simmons, 512 U.S. at 169 (plurality uses "alternative sentence to death is [LWOP]" language in its statement of the holding); 512 U.S. at 177 (concurring opinion uses "only available alternative sentence to death" language). See also Ramdass, 120 S.Ct. at 2120 (plurality cites with approval Justice O'Connor's "only available alternative sentence" language); 120 S.Ct. at 2126 (Justice O'Connor reiterates her "only available alternative sentence" language in the concurring opinion). Indeed, even the Ramdass dissent used Justice O'Connor's "only available alternative sentence" language in its statement of the Simmons rule, 120 S.Ct. at 2135, and Justice O'Connor stated:

> In Simmons v. South Carolina . . ., *a majority of the Court held* that "where the State puts the defendant's future dangerousness at issue, and the only available alternative sentence to death is life imprisonment without the possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible".

Ramdass, 120 S.Ct. at 2126 (emphasis).[2] See also Keel v. French, 162 F.2d 263 (4th Cir.

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[2] It is Petitioner, however, that takes statements in Ramdass out of context when he quotes the plurality's explanation of the holding of Simmons. See Brief of Petitioner p. 18 (stating: "Later, Justice Kennedy elaborated on this point, observing that under Simmons, a "parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law."). Justice Kennedy was merely describing Simmons's applicability to a scheme where a life sentence carried the possibility of parole unless the defendant's prior record precluded parole. A similar scheme existed under Virginia law in Ramdass. Justice Kennedy was not addressing a scheme like the one present in this case, where a mandatory minimum definite term sentence was a third option to LWOP and death. As such, Justice Kennedy's statements cannot be read in isolation to preclude the state's argument here.

1998) (recognizing Justice O'Connor's concurring opinion in Simmons as a statement of the case's holding).

Of course, resolution of a Simmons claim in this case depends on making an analogy between a life sentence with the possibility of parole under the old South Carolina scheme (which was present in Simmons), and a definite mandatory minimum sentence under the new penalty scheme (which is present in this case).[3] Such an analogy is appropriate. The concern in Simmons was that the solicitor had created a "false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. at 171. As held in United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), it does not matter whether the "false dilemma" is avoided by the presence of a life sentence with parole, or whether it is avoided because the defendant could potentially receive a sentence of a definite term. The fact remains that another legally available option existed besides death and LWOP. The mechanism by which Petitioner could be released, either parole or expiration of a definite term, is irrelevant because release is inherent in either type of sentence, and the "false dilemma" of a future dangerousness argument only exists where the defendant will never be released. See Ramdass v. Angelone, 120 S.Ct. 2113, 2135 (2000) ("If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . *will never be part of society again*." (Stevens, J., dissenting) (emphasis added); Starnes, Op. No. 25119, 2000 W.L. 576191, *9 (unlike a sentence of LWOP, "a mandatory

[3] Cf. Flores, 63 F.3d at 1366-68 (discussing a Simmons claim in the context of whether a definite term sentence existed as an alternative to LWOP).

minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society").[4]

Other cases have ruled Simmons inapplicable under penalty schemes and situations similar to this one. In United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), co-defendant Juan Garza faced a capital trial in federal court for a number of murders related to drug trafficking. The evidence against Garza showed that he either contracted for or participated in the murders of three men. 63 F.3d at 1351-52. Garza requested the jury be instructed that LWOP was the only alternative sentence, but the trial court instead told the jury that, if the jury did not recommend death, the court could impose either LWOP or another sentence. 63 F.3d at 1367. Under 21 U.S.C. § 848(e), the court could sentence the defendant to "any term of imprisonment" from 20 years to LWOP, assuming the jury did not recommend death. In addition to some mitigators, Garza's jury found first-tier aggravators, second-tier aggravators, and non-statutory aggravators, including that Garza premeditated and planned the killings, that he participated in a contract killing, and that he was also responsible for five more killings. Flores, 63 F.3d at 1366-67.

In challenging his death sentence, Garza argued that if the jury did not return a death sentence, the trial court would have had no choice but to impose LWOP. According to Garza, a comment in the Federal Sentencing Guidelines necessarily and expressly prevented the trial court from imposing a lower sentence than LWOP, because the jury

[4] Similarly, this Court in Simmons noted that the "false dilemma" was not created when the prosecution was merely arguing that the defendant was be dangerous in the future to other inmates and prison staff, because obviously whether the defendant will get out of prison is irrelevant to such a future dangerousness argument. See Simmons, 512 U.S. at 165 n.5 (plurality opinion); 512 U.S. at 177(O'Connor, J., concurring).

found as an aggravator that he intentionally killed his victims. Garza also argued that certain enumerated factors authorizing lower sentences in the Federal Sentencing Guidelines, were not present in his case. Thus, Garza asserted Simmons was triggered because the trial judge would have to give a LWOP sentence if the jury did not recommend death. Flores, 63 F.3d at 1367-68.

In rejecting this argument, the Flores decision stated:

> However, assuming without deciding that the jury's findings of intentional killing would be binding on the sentencing judge and therefore prevent a downward departure, **the court could not predict before the jury begins its** [sentencing phase] **deliberation** whether it is going to find the necessary intent. Thus, when the attorneys make their final arguments in the penalty phase and **when the court gives its penalty instructions, no one would know whether life imprisonment would be the only permissible sentence**.

63 F.3d at 1368 (emphasis added). Moreover, the court also concluded that the general discretionary mitigator in the Sentencing Guidelines at least remotely left open the possibility of a lesser sentence. Thus, Flores rejected the Simmons claim because LWOP was not the only alternative sentence legally available. Flores, 63 F.3d at 1368.[5]

Like Garza, Petitioner also had a sentencing alternative other than death. At the time the attorneys gave their penalty phase arguments and the judge gave his penalty phase charge, no one could have conclusively predicted whether the jury would find a

[5] In People v. Simpson, 665 N.E.2d 1228 (Ill. 1996), the court also rejected a similar argument. The defendant on appeal claimed the trial judge erred by only instructing the jury that the court would impose some other sentence on the defendant if the jury did not return a death sentence. The Simpson court noted that an LWOP instruction would be required in a multiple murder situation where under statutory law LWOP would be the only alternative sentence. Thus, the court held Simmons inapplicable because the defendant, who only killed one person, was statutorily eligible for a sentence other than LWOP. 665 N.E.2d at 1244-45.

necessary aggravator. Therefore, it was impossible to know whether LWOP would be the only possible alternative sentence until after the jury's penalty phase verdict. If the jury had not found an aggravator, then Appellant could have received a sentence as low as 30 years. Accordingly, he had a *legally available sentence* besides death and LWOP, and thus Simmons is inapplicable.

This Court similarly rejected a "functional" approach to Simmons in Ramdass. Both the plurality and concurring opinions found it neither "necessary [n]or workable" for trial courts to "evaluate the probability of future events" in order to determine Simmons's applicability. Ramdass, 120 S.Ct. at 2121, 2127-28. Similarly, in this case a trial court would have to evaluate the future likelihood that the jury would find an aggravator beyond a reasonable doubt. Unlike the Ramdass plurality, concurrence, and dissent's disagreement over the effect of entry of judgment under Virginia law, a jury's duty to make factual findings beyond a reasonable doubt can hardly be termed to be "ministerial" or "inevitable and foreordained". Ramdass, 120 S.Ct. at 2123, 2127. As such, Simmons is inapplicable.

Appellant dismisses the argument that another sentence was available by noting the jury only decides between life and death, and the jury makes no sentencing recommendation if it fails to find an aggravator. It is generally true that the sentencing jury makes an either/or selection. Cf. State v. Norris, 285 S.C. 86, 95, 328 S.E.2d 339, 344 (1985). Again, it does not matter whether the Simmons "false dilemma" is avoided by the presence of a life sentence with parole, or whether it is avoided because the defendant could potentially receive a sentence of a definite term.

Further, the test for other available alternative sentences to death other than LWOP

is *at the time of sentencing*. Ramdass, 120 S.Ct. at 2119 (Simmons has not been "extended to cases where parole ineligibility has not been established as a matter of state law *at the time of the jury's future dangerousness deliberations in a capital case*.") (plurality opinion, emphasis added). It cannot be challenged that at the time of Petitioner's sentencing, a lesser definite term sentence was legally available to Petitioner under South Carolina state law.

Indeed, Appellant seeks to create within the jurors a sort of reverse-Simmons "false sense of security," that if they fail to return a death sentence, LWOP will be imposed. This is inaccurate, unfair to the state, and not constitutionally required.[6] See Ramdass v. Angelone, 120 S.Ct. 2113, 2120 (2000) ("In this case, a Simmons instruction would not have been accurate under the law."); Simmons 512 U.S. at 161-62 ("grievous misperception [about LWOP] was encouraged by the trial court's refusal to provide *accurate information* regarding petitioner's parole eligibility) (emphasis added); Gregg v. Georgia, 428 U.S. 153, 190 (1976) (*Eighth* Amendment requires provision of "accurate" sentencing information); State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *6 (S.C. filed May 8th, 2000) ("Informing the jury that appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.").

Moreover, even though the jury only chooses between LWOP or death if it finds an aggravator, the jury's findings still ultimately drive which one of the three sentencing options is available to the defendant, as only if the jury fails to return an aggravator does

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[6] Further, defense counsel conceded at trial that "juries from May 30th, 1996 have three options in the state of South Carolina." **{R. 1949 ll. 15-21}**.

the mandatory minimum thirty year sentence become a possibility. In South Carolina, when the murder defendant seeks a jury trial, the jurors decide whether aggravating factors are present. State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989) ("In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight."), cert. denied, 494 U.S. 1060 (1990); State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986) ("The trial judge must submit to the jury those aggravating circumstances are supported by the evidence."), cert. denied, 480 U.S. 940 (1987).[7] Petitioner asked for and got his jury trial; it is speculative and would make the jury's role in determining aggravating factors irrelevant to contend that at the time of the charge only death and LWOP were available. See State v. Starnes, Op. No. 25119, 2000 W.L. 576191 (S.C. filed May 8th, 2000) ("inappropriate" to assume jury will necessarily find existence of an aggravator beyond a reasonable doubt). Moreover, Simmons is not triggered when the defendant's entitlement to a third sentencing alternative depends on resolution of a matter of fact.[8]

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[7] See also S.C. Code Ann. § 16-3-20(B) (Supp. 1997) ("The [sentencing] proceeding must be conducted by the trial judge before the trial jury . . . . If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge.").

[8] In Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 489 U.S. 1040 (1989) the court rejected a Simmons claim from a defendant who was technically eligible for parole. The defendant claimed error in (1) the failure of the trial court to admit expert testimony that a Texas parole board "almost certainly" would consider the defendant ineligible for parole, and (2) the judge's failure to so charge the jury. Scott noted that Simmons requires that the defendant's parole ineligibility turn on a matter of law, NOT a matter of fact. Thus, the court concluded:

> A capital defendant's parole ineligibility must be a matter of law because evidence of such ineligibility is inherently "truthful" . . . . **But if a defendant's parole ineligibility is a matter of fact, i.e. the defendant probably will not**

Admittedly, Petitioner's counsel did argue to the jury that "you're going to find a statutory aggravator." **{R. 1915 ll. 9-14}**. However, Appellant did NOT concede the aggravator as a matter of law. Instead, the jury was instructed of its duty to find an aggravator beyond a reasonable doubt and that it should stop further deliberation if it failed to so find. **{R. 1920 ll. 8-10; 1923 ll. 13-16; 1927 ll. 18-21; 1928 l. 23 - 1929 l. 5}**. Thus, like Flores, at the time the judge charged the jury, the definite term sentence was still a possibility, and LWOP was not the only legally available alternative sentence to death. Cf. also State v. Mitts, 690 N.E.2d 522, 528-29 (Ohio 1998) (rejecting Simmons argument that trial judge erred in failing to answer jury's question whether two life sentences would be served consecutively, and noting, "[defense] counsel's argument that it was unrealistic to think that the trial judge would impose concurrent sentences here is speculative."). As such, and like Ramdass, Petitioner has not "conclusively established" that LWOP was the only available alternative sentence to death at the time of sentencing. Ramdass, 120 S.Ct. at 2120. Simmons is not triggered.

Of course, the practical effect of such a rule is that solicitors may argue future dangerousness without the necessity of an LWOP charge, unless the LWOP-qualifying "serious offenses" or "most serious offenses" trigger South Carolina Code section 17-25-45. Petitioner contends that the South Carolina Supreme Court has ruled Simmons

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> **be eligible for parole, then the evidence is purely speculative** (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness.

Scott, 41 F.3d at 21-22 (emphasis added). Just like Scott, whether Petitioner was eligible for a mandatory minimum 30-year sentence depended on his jury's resolution of a matter of fact.

inapplicable to its sentencing scheme. However, the state court's result is no different than what existed under the old South Carolina scheme, as even under the statutory scheme in Simmons itself solicitors could argue future dangerousness without an LWOP charge, unless the defendant had a prior "violent crime" making him ineligible for parole under South Carolina Code section 24-21-640. In this case, Simmons is inapplicable unless the defendant's prior record qualifies him for LWOP under section 17-25-45. In both the Simmons situation and the present situation, it is the defendant's prior record that controls the applicability of Simmons, and there is no material difference between the situations.

In its brief to the South Carolina Supreme Court in this case, the state raised a number of practical problems if the court extended Simmons to Petitioner's case. Brief of Respondent pp. 36-38. Similarly, the plurality in Ramdass noted that a parole ineligibility charge is of "uncertain materiality", and can be overcome if a jury concludes the defendant may escape, be pardoned, benefit from a change in state laws, or be dangerous to society in prison. It noted that the possibility of peripheral litigation on LWOP issues could legitimately lead a state to conclude the jury may be distracted. Thus, the Ramdass plurality concluded that Virginia state courts had "good reason not to extend Simmons beyond the circumstances of that case", Ramdass, 120 S.Ct. at 2121-22, and stated that "States have some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case, subject to the rule of Simrnons." Ramdass, 120 S.Ct. at 2119, 2121.

The South Carolina Supreme Court ruled that "neither parole eligibility nor parole ineligibility are proper considerations for the jury". State v. Shafer, Op. No. 25120, 2000 W.L. 576189, *7 (S.C. filed May 8th, 2000). Because evidence of parole ineligibility is of

"uncertain materiality", and because of the potential of practical problems and collateral litigation in charging a jury under the new sentencing scheme, South Carolina similarly had good reason not to extend Simmons beyond the circumstances of that case.

E. The prosecution did not argue future dangerousness; thus, the rule in Simmons was not triggered.

As noted before, the Simmons test requires that both prongs be present for its rule to attach. Thus, if the solicitor did not argue future dangerousness, a Simmons charge is not necessary. The trial judge repeatedly found that future dangerousness was not an issue in this case. **{R. 1820 l. 24 - 1821 l. 6; 1893 l. 23 - 1894 l. 10; 1896 ll. 18-22}**.

As an initial matter, Petitioner seems to challenge the premise that future dangerousness argument by the prosecution, or at least some express reliance on future dangerousness by the prosecution, is necessary to satisfy first prong of the Simmons test. Such a view is as odds with this Court's expression of the Simmons rule. See Ramdass, 120 S.Ct. at 2117 (plurality opinion) (state submitted to the jury a future dangerousness aggravating circumstance); 120 S.Ct. at 2126 (concurring opinion) (noting that the state must seek "to demonstrate that the defendant poses a future danger to society"); 120 S.Ct. at 2135 (dissenting opinion) (stating: "If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . will never be part of society again."). See also Simmons, 512 U.S. at 162 ("grievous misperception" encouraged by "state's repeated suggestion that petitioner would pose a future danger to society); 512 U.S. at 163 (prosecutors in South Carolina often emphasize a defendant's future dangerousness in their evidence and argument, and they urge the jury to sentence the defendant to death so he will not be a danger to the public if released); 512

U.S. at 168-69 ("If the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . .").

If Petitioner is correct that the state raises future dangerousness by merely introducing evidence in the sentencing phase about a murder defendant's past criminal conduct and bad acts, then the first prong of Simmons would be superfluous and Simmons would apply to every capital case where the only alternative sentence to death was LWOP. Justice O'Connor flatly rejected such a view in Simmons:

> Likewise, if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death" is LWOP.

512 U.S. at 175 (O'Connor, J., concurring). Similarly, the Simmons plurality also implied that character, prior criminal history, and background are not the same thing as future dangerousness. 512 U.S. at 164 ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, *in addition to future dangerousness*, that a jury may consider in fixing punishment." (Emphasis added)). See also State v. Southerland, 316 S.C. 377, 387, 447 S.E.2d 862, 868 (1994) (rejecting a Simmons claim by noting that the "solicitor specifically agreed not to argue [the defendant's] future dangerousness"), cert. denied, 513 U.S. 1166 (1995), and overruled on other grounds by State v. Chapman, 317 S.C. 302, 524 S.E.2d 833 (1999); State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1994) (evidence of prior record and character relevant in the sentencing phase without regard to future dangerousness, where no contention that defendant should be sentenced to death because of future dangerousness); State v. Williams, 468 S.E.2d 626, 321 S.C. 327 (1996). Along with South Carolina, Pennsylvania has also noted the distinction that evidence of prior criminal conduct does not necessarily

raise future dangerousness. See, e.g. Commonwealth v. May, 710 A.2d 44, 47 (1998), cert. denied, 525 U.S. 1078 (1999).

Further, both the Simmons plurality and Justice O'Connor in concurrence recognized that the state could legitimately argue that the defendant would be a future danger to other inmates and prison staff, without triggering the rule in Simmons. 512 U.S. at 165 n. 5; 512 U.S. at 177. Clearly, it is the use to which the prosecution puts the evidence which triggers the rule in Simmons.

In this case, unlike Ramdass, future dangerousness was not submitted to the jury as a statutory aggravator. Unlike Simmons, the prosecution did call any mental health experts to testify that Petitioner would likely be dangerous in the future. Despite this, Petitioner points to a number of factors from which he asserts the state raised the issue of future dangerousness.

First, Petitioner argues that the boilerplate language in the state's Notice of Evidence in Aggravation of the Punishment raises future dangerousness. Even if true, it is irrelevant; no "false dilemma" in violation of Simmons can arise from assertions in a document which is never before the jury. Cf. Simmons, 512 U.S. at 171.

Next, Petitioner argues that the evidence that he had been involved in an incident where some guys engaged in sex with two 12-year-old girls, as well as evidence that Petitioner got into an altercation with a jail employee, raised the issue of future dangerousness. In this case, the state did introduce evidence about Petitioner's past conduct and prior criminal record. While the solicitor generically referred once to the jury's right to consider Petitioner's character **{R. 1885 ll. 6-7}**, he ***never once*** referred to any of

Petitioner's past conduct or criminal record during his argument. As noted before, the state was entitled to produce evidence of Petitioner's past criminal conduct and bad acts without triggering Simmons, where it never expressly raised to the jury that Petitioner should be sentenced to death because he might be a danger in the future.

Petitioner contends the solicitor did in fact argue future dangerousness when he stated:

> Ladies and Gentlemen, one of the scariest things, certainly the crime, certainly the video, but one of the scariest things I think about that second video, the video where we saw the cash tape, the horror and all of the sound, do you remember the girls that came in and when Jamie Palmer was saying "Oh, God; Oh, God; Ray, Ray" and the girls were running in and out, we've got to go, we've got to go, and I tell you what, I've listened to it, you've listened to it, and you will have a chance again, but what is really etched in my mind is Monica Inman. Remember Jamie picks up that phone and she's calling 911, and Monica Inman says "Come on, Jamie, they might come back, they might come back".
>
> Ladies and Gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the State. So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, and they might come back, they might come back, they will remember this day, and they will remember this jury, and they will remember this verdict.

{R. 1891 l. 7 - 1892 l. 1}. Petitioner contends the reference to "they might come back" raises future dangerousness. The first time the solicitor referred to the phrase, he was describing the evidence. The second time is clearly part of a general deterrence argument, not a future dangerousness argument. The "they" in the second paragraph obviously refers to "the next time somebody thinks about loading up" and coming to Union County, not Petitioner specifically.

It is elementary that a future dangerousness argument is a specific deterrence

argument. See, e.g. Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986) (future dangerousness is relevant to specific deterrence); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (future dangerousness is relevant to specific deterrence); State v. Rose, 451 S.E.2d 211 (N.C. 1994) (future dangerousness is a specific deterrence argument). There is a distinction between specific deterrence and general deterrence arguments. State v. Simmons, 310 S.C. 439, 445, 427 S.E.2d 175, 179 (1993), rev'd on other grounds, 512 U.S. 154 (1994). Thus, a general deterrence argument does not raise future dangerousness.

Moreover, the arguments Appellant points to in Simmons which were held to raise future dangerousness also only sought specific deterrence against the particular defendant. In Simmons, the prosecutor told the jury its role was to decide "what to do with [petitioner] now that he is in our midst". The prosecutor also stated: "Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." 512 U.S. at 176. The "someone" in Simmons was that particular defendant, not some hypothetical future defendant as argued in this case.

The state was entitled to introduce Appellant's past conduct and prior record without raising future dangerousness. Since the solicitor only argued general deterrence, and never in fact referred to any of Appellant's prior record, the state never put future dangerousness into issue. Accordingly, Simmons is not triggered, and certiorari should be denied.

II. The exclusion of evidence on the deterrent effect of the death penalty does not violate due process where both the state and the defense have equal opportunity to argue their respective views on the issue.

A. How the federal question was raised and decided below

1. Events at trial

At trial, the solicitor made the following argument during the sentencing phase:

> Ladies and Gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the State. So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, and they might come back, they might come back, they will remember this day, and they will remember this jury, and they will remember this verdict.

{R. 1891 l. 19 - 1892 l. 1}. After reminding the jury that the frightened witness who found the victim stayed with him until help arrived, the prosecutor asked for similar courage from the jury. The prosecutor then concluded:

> Let everyone know this day in Union County justice was done in this case that will send a message of how Union County handles a crime of this nature.

{R. 1892 l. 2 - 1893 l. 6}.

Prior to defense closing argument, the defense moved to reopen the record to present "issues of statistics and witnesses" as to the death penalty's deterrent value. The defense concluded that the solicitor had brought deterrence into issue, and it asked "for time to present evidence to rebut that". In the alternative, the defense requested an instruction that the jury was to disregard the solicitor's references to "danger to the community". **{R. 1894 ll. 11-23}**.

After the solicitor pointed out South Carolina case law that allowed general

deterrence argument without the need for such evidence, the trial court ruled that "you can't introduce [general deterrence] evidence, but you can argue it." **{R. 1895 ll. 18-21}**.

2. Appeal

The South Carolina Supreme Court rejected this issue as follows:

> In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.
>
> In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.
>
> * * *
>
> Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

State v. Shafer, Op. No. 25120, 2000 W.L. 576189 (S.C. filed May 8th, 2000).

B. Since Petitioner had as much an opportunity in argument to "deny or explain" the general deterrent effect of the death penalty as the state did to assert it, there was no violation of due process.

According to Petitioner, he is only raising the "narrow" claim that due process requires evidence about the death penalty's deterrent effect if the prosecutor argues general deterrence. He relies on the general due process rule that a defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny

or explain". Gardner v. Florida, 430 U.S. 349, 362 (1977). However, the even playing field at Petitioner's trial precludes a successful due process claim.

South Carolina law is clear that either side may argue general deterrence, but no side may introduce evidence on the issue. For example, State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), a unanimous court affirmed the trial judge's rejection of a defense witness called to testify about the deterrent effect of the death penalty. George reasoned that since the propriety of capital punishment was for the legislature, and constitutionality was for the courts, evidence regarding the deterrent effect of the death penalty was irrelevant. More importantly, the court also stated:

> However, counsel for both sides may argue their respective opinions concerning the deterrent effect of capital punishment, but cannot introduce specific data to corroborate their views.

George, 323 S.C. at 514, 476 S.E.2d at 914. See also State v. Shafer, Op. No. 25120, 2000 W.L. 576189 (S.C. filed May 8th, 2000).

Petitioner cites to cases from other jurisdictions which have taken a different tack on the issue, and barred general deterrence argument. However, there are also a number of cases that have arrived at results analogous to South Carolina's rule. In Fleming v. State, 458 S.E.2d 638 (Ga. 1995), the court cited a plethora of cases supporting the propriety of closing argument on general deterrence. Id. (citing Gregg v. Georgia, 428 U.S. 153 (1976)). Reasoning that both the prosecution and defense were equally precluded from deterrence evidence but allowed deterrence argument, the court also rejected the claim that the exclusion of expert testimony of the non-deterrent effect of the death penalty meant that the defendant was sentenced on the basis of information he had "no opportunity to deny or explain". Fleming, 458 S.E.2d at 640.

The Eleventh Circuit also held that general deterrence was an appropriate consideration for a sentencing jury. See Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified on other grounds, 781 F.2d 185 (11th Cir. 1986), cert. denied, 479 U.S. 909 (1986). Martin further reasoned that the Constitution allows general deterrence argument even if general deterrence evidence is excluded. 770 F.2d at 937.

The Eleventh Circuit earlier addressed these issues in Collins v. Francis, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963 (1984). Collins found support from two decisions of this Court for the premise that general deterrence was a permissible sentencing consideration. Collins, 728 F.2d at 1339-40 (discussing Williams v. New York, 337 U.S. 241 (1949) (approving general deterrence as one factor appropriately considered by a judge in imposing sentence), and United States v. Grayson, 438 U.S. 41 (1978) (indicating no "qualms" about a district judge's general deterrence comments in sentencing)). Collins also rejected the notion that the prosecution had to "prove" with empirical evidence the deterrent effect of the death penalty before it could make general deterrence argument, because: (1) criminal sanctions have "historically" been justified in part on theories of general deterrence, and (2) empirical evidence would be "difficult, if not impossible" to produce with any "significant particularity" to guide the sentencing body. 728 F.2d at 1340.

Thus, Petitioner is incorrect that general deterrence in an inappropriate consideration for sentencing a particular defendant to death. See also Skipper v. South Carolina, 476 U.S. 1, 12 (1986) (Powell, J., concurring) ("We have recognized that society has important and legitimate interests in retribution and deterrence, and that these interests provide the necessary justification for the death penalty."). Indeed, members of

this Court have noted that the death penalty is "undoubtedly" a deterrent for some murderers. Gregg v. Georgia, 428 U.S. 153, 185 (1976).

Since general deterrence argument is proper, the question thus becomes whether exclusion of evidence on general deterrence violates the due process rule in Gardner v. Florida. In this case, the trial court's ruling was evenly applicable to both sides. And like the state, Appellant did in fact make his own general deterrence argument. Defense counsel argued:

> The solicitor asked you to deliberate. I ask you, what do you teach your little children? You teach them . . . love and affection. Do you teach them as Wesley Schafer was taught, having you clothes set on fire, being beat, being thrown out of the house?
>
> Martin Luther King . . . told all of his followers not to respond in violence when you face violence, that will not solve the problem. And it won't solve the problems in our context here.

{R. 1906 l. 16 - 1907 l. 1}. Counsel continued:

> You know, what do we teach our children if we resort to violence, if we have the state of South Carolina, citizens of Union County execute Wesley Shafer? Will that violence teach us anything? Will it teach the children anything that's right?

{R. 1908 ll. 4-8}. Deterrence argument in Appellant's trial was made on a fair and level playing field which provides no basis for challenging the sentencing result.

Similarly, Appellant misses the mark with his assertion that the lack of general deterrence evidence violates "the due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain." Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986) (citing Garner v. Florida, 430 U.S. 349 (1977)). Of course, Skipper and Garner dealt with evidence, not argument, and

as the trial judge charged the jury in this case, argument is not evidence. **{R. 902 l.15 - 903 l. 25; 1356 ll. 11-18; 1437 ll. 11-16}**. Since both sides not only had even opportunity but in fact did argue general deterrence, Appellant had as much an opportunity to "deny or explain" general deterrence as the state did to assert it. For this reason coupled with the judge's charges, any error was harmless. Cf. generally Skipper, 476 U.S. at 8.

Petitioner challenges this rationale by arguing that the elected solicitor's opinion on general deterrence unfairly carries more weight with the jury than the argument of defense counsel. Of course, such an issue could be raised with regard to **any** aspect of closing argument, such as conflicting arguments as to the inferences to be drawn from circumstantial evidence. Moreover, there are undoubtedly many capital defense attorneys who are far more in the public eye than their public servant counterparts, and it is speculative to assume that Petitioner's jury naturally accorded more weight to the solicitor's argument.

Further, it is not inconsistent to allow argument but deny evidence on general deterrence. Prosecution arguments about general deterrence such as the one in this case are usually part of an argument urging fearless administration of justice. On the other hand, defense arguments on general deterrence, such as the one in this case that violence doesn't solve violence, are usually are part of an argument for mercy. Both of these types of argument, which merely seek to impress upon the jury its responsibility in sentencing, are a far cry from the jury actually listening to battles of experts and statistics and essentially making factual findings about whether the death penalty is a deterrent. The state can legitimately conclude to avoid such collateral litigation in a sentencing

proceeding.[9] See, e.g. Ramdass, 120 S.Ct. 2121-22.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By: _____

August 21st, 2000

[9] Appellant cites statistics in his brief which were not proffered at trial, and are not properly considered. See Ramdass, 120 S.Ct. at 2123-24. In any event, similar statistics and argument support the existence of a deterrent effect. See John C. McAdams, "Wisconsin Should Adopt Death Penalty," 79 Marq. L. Rev. 707, 710-13 & nn. 10-23 (1996). Prison guards have testified that inmates given life without parole become very dangerous because they know nothing further can be done to them without a death penalty. See United States v. Battle, 979 F. Supp. 1442, 1464-66 (N.D. Ga. 1997).

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that Respondent's ***Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of South Carolina*** in the foregoing action has been served on opposing counsel by depositing two (2) copies in the United States mail postage prepaid to the following:

David I. Bruck
P.O. Box 11744
Columbia, SC 29211

This 21st day of August, 2000.

DONALD J. ZELENKA

Appendix

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Wesley Aaron Shafer, Jr., Appellant.

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25120
Heard October 7, 1999- Filed May 8, 2000

AFFIRMED

David I. Bruck, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Ray Broome while attempting to rob the convenience store where Broome was

working. Appellant maintained the killing was without malice.[1] A jury convicted appellant of murder, attempted armed robbery, and conspiracy. He was sentenced to death for murder and consecutive terms of twenty years' imprisonment and five years' imprisonment, respectively, for attempted armed robbery and conspiracy.[2] Appellant appeals.

FACTS

Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.

At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.

Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned outside.

Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the

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[1]During the penalty phase of trial, appellant's expert witness testified appellant shot Broome in response to a lifetime of abuse and violence.

[2]The jury found the statutory aggravating circumstance of murder while in the commission of an attempted armed robbery while armed with a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) Supp. 1998.

register counter, and shot Broome a second time.[3] Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.

Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store, found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head.[4] Broome died at the hospital.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him, and I'm the one that had the gun, and I guess I just snapped."

ISSUES[5]

I. Did the trial court err by refusing to instruct the jury appellant was parole ineligible?

II. Did the trial judge err by granting the State's motion to prohibit both the prosecution and defense from referring to the Bible or using religious references during closing argument?

III. Did the trial judge err by refusing to allow appellant to reopen the record to present evidence on deterrence or, alternatively, for a curative instruction after the solicitor argued

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[3]Appellant waited eight seconds before firing the second shot.

[4]All the events inside the Hot Spot were recorded on the store's security camera.

[5]All issues stem from the sentencing phase of appellant's trial.

the general deterrent effect of the death penalty?

DISCUSSION

I.

Appellant argues, for various reasons, the trial court erred by refusing to instruct the jury he was parole ineligible. We disagree.

After closing arguments, relying on Simmons v. South Carolina, 512 U.S. 154 (1994), appellant requested the trial court instruct the jury he would be ineligible for parole. The trial court denied the request.

Thereafter, the trial judge instructed the jury "life imprisonment means until the death of the defendant." He later stated: "[i]n deciding whether to sentence the defendant to death or to life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death."

After three and one-half hours of deliberation, the jury returned with the following questions:

1. Is there any remote chance for someone convicted of murder to become eligible for parole?

2. Under what conditions would someone convicted for murder be eligible?

Regarding Question 1, appellant agreed the trial court should instruct the jury "life imprisonment means until the death of the offender and requested the court read the portion of § 16-3-20(A) which explains no person sentenced to life imprisonment is eligible for parole or any other form of release or credits which would reduce a life sentence. Appellant stipulated Question 2 could not be answered. After the trial judge informed the parties of his intended response to the jury's questions, appellant requested the trial

judge delete any reference to parole eligibility.[6]

The trial judge responded to the jury's questions as follows:

> Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, 'for the purposes of this section life imprisonment means until the death of the offender.' Parole eligibility or ineligibility is not for your consideration.

Appellant excepted stating, "we would renew our objection under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the State and Federal Constitutions." The trial judge noted the exception.

A.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends Simmons mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. Id.; State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in

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[6]The trial judge stated he would charge the jury as follows: "[y]our consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life imprisonment means until the death of the offender. Parole eligibility is not for your consideration."

his view, would not pose a future danger to society." Simmons, 512 U.S. at 165 (1994) (plurality opinion).

Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp. 1998). Under the new sentencing scheme, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. We recently held Simmons is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. State v. Starnes, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 17).[7] Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues Simmons mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read Simmons so narrowly. By its own terms, Simmons requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defendant. Simmons, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole. . ."). (emphasis added). This interpretation is supported by decisions from other jurisdictions. Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999) (Simmons is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and,

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[7]In Starnes, we suggested, under the terms of the statute, it is arguable a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

therefore Simmons is inapplicable); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108 (1995) (Simmons applies where capital defendant is ineligible for parole as a matter of law; Simmons does not apply even if it is unlikely defendant would be paroled); People v. Simpson, 665 N.E.2d 1228 (Ill.), cert. denied, 519 U.S. 982 (1996) (Simmons inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995), cert. denied, 516 U.S. 1133 (1996) (Simmons inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, Simmons was inapplicable.[8]

B.

Appellant contends the failure to inform the jury he was parole ineligible violated the Eighth Amendment prohibition against the arbitrary

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[8]The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting Flores, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In Flores, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in State v. Starnes, supra, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

infliction of the death penalty.[9] He specifically argues the failure to inform the jury of his parole ineligibility prevented him from presenting mitigating evidence in support of a sentence less than death and diminished the reliability of the jury's sentencing decision. In light of the new sentencing statute, he asks the Court to reconsider its policy prohibiting the trial judge from informing the jury a capital defendant is parole ineligible.

Initially, we note this issue is not properly preserved for appellate consideration. After the trial judge responded to the jury's question, appellant stated he excepted "on the basis of the Eighth Amendment." He offered no explanation or argument in support of the exception. Appellant's objection to the supplemental instruction is simply too vague for the Court to review. State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (general objection leaves nothing for Court to review). Clearly, appellant never argued, as he does now, that the Eighth Amendment requires a charge on parole ineligibility as mitigating evidence and to ensure the reliability of the sentence imposed. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge).

In any event, the Eighth Amendment requires that a death sentence not be imposed arbitrarily. Jones v. United States, 527 U.S. 373 (1999). It prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty. Payne v. Tennessee, 501 U.S. 808, 822 (1991) (citing Eddings v. Oklahoma, 455 U.S. 104, 114 (1982)). The United States Supreme Court has "deferred to the State's choice of substantive factors relevant to the penalty determination." California v. Ramos, 463 U.S. 992, 1001 (1983). Whether parole eligibility is relevant to the sentencing determination is a matter of state law. Id.; see Simmons v. South Carolina, 512 U.S. 154, 176 (O'Connor, J., concurring) ("[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the

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[9]U.S. Const. amend. VIII.

States.").[10]

In South Carolina, parole eligibility is not relevant to a jury's sentencing considerations. State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995) (defendant who was parole eligible after service of thirty years not entitled to charge on parole eligibility). The refusal to inform the jury of the capital defendant's parole eligibility does not violate the Eighth Amendment. Id.

Although we have never explicitly ruled whether the Eighth Amendment entitles a capital defendant to a charge informing the jury he is parole *in*eligible, precedent suggests no such instruction is required.[11] In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, J., concurring), the Court held the defendant who was parole ineligible due to a prior conviction for a violent crime was not entitled to a charge informing the jury of his parole ineligibility. In State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), cert. denied 513 U.S. 1166 (1995), overruled on other grounds State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995), we concluded there was no Eighth Amendment violation where the trial judge did not instruct the jury the defendant was parole ineligible but defense counsel argued "life imprisonment" means the defendant will never be released from prison. In Simmons v. South Carolina, 512 U.S. 154 (1994), the United States Supreme Court declined to hold the Eighth Amendment requires the jury to be informed a capital defendant is parole ineligible.

Relying on Skipper v. South Carolina, 476 U.S. 1 (1986), appellant asserts parole ineligibility is a mitigating circumstance of which the jury should have been informed. We disagree.

As noted above, the Eighth Amendment prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence."

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[10]O'Dell v. Netherland, 521 U.S. 151, 165 (1997) ("[I]n Simmons, the Court carved out an exception to the general rule described in Ramos by, for the first time ever, requiring that a defendant be allowed to inform the jury of the postsentencing legal eventualities.").

[11]Appellant agrees there has been a blanket prohibition against any instruction on parole eligibility or ineligibility.

Payne v. Tennessee, 501 U.S. 808, 822 (1991). For purposes of the Eighth Amendment, mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4, citing Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); see State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt). In Skipper, the Supreme Court held evidence of the defendant's good behavior while in jail awaiting trial was potentially mitigating because it indicated he would not pose a danger in the future. Accordingly, excluding evidence of the defendant's future adaptability violated the Eighth Amendment.

Unlike a defendant's behavior in prison, parole ineligibility is not an aspect of a defendant's character or record. Parole eligibility or ineligibility is a legislative determination; it is not mitigating evidence. See State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989), vacated on other grounds 493 U.S. 1013 (1990) (information regarding requirements for parole eligibility is not mitigating evidence); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. denied, 489 U.S. 1091 (1989) ("punishment for a crime cannot serve as a mitigating sentencing consideration"); see also State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (the general effect of capital punishment as a deterrent to crime is not a mitigating circumstance). The Eighth Amendment is not violated by refusing to inform the jury a capital defendant is parole ineligible.

Appellant asserts since all capital defendants are now parole ineligible, the Court should permit juries to be informed of parole ineligibility. He claims providing juries with accurate information on parole ineligibility will eliminate prejudicial misinformation juries hold concerning parole eligibility and produce more reliable sentencing determinations. We disagree.

Traditionally, in South Carolina it is the jury's duty and responsibility in the sentencing phase of a capital trial to impose a punishment authorized by law in consideration of the circumstances of the crime and the characteristics of the individual defendant. The jury is not authorized to legislate a plan of punishment. State v. Plath, 281 S.C. 1, 313

S.E.2d 619, cert. denied 467 U.S. 1265 (1984); see State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111 (1970), citing State v. White, 142 A.2d 65, 76 (N.J. 1958) ("the Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs."), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The jury's duty is the same under the new sentencing statute. While a defendant's parole ineligibility could affect the jury's decision, it nonetheless remains an irrelevant factor which the jury should not consider. Affirmatively mentioning an irrelevant factor would undermine the jury's decisionmaking process and result in a decision which is less, rather than more, reliable. As a matter of policy, we maintain it is inappropriate to inform the jury the capital defendant is parole ineligible. The Eighth Amendment does not compel a different result. Jones v. United States, 527 U.S. 373, ___, 119 S.Ct. 2090, 2099 (1999) (a death sentence is not arbitrary within the meaning of the Eighth Amendment "if the jury is not given any bit of information that might possibly influence the individual juror's voting behavior.").

C.

Appellant argues the trial judge's supplemental instruction was erroneous. He contends 1) in responding to the jury's questions, the trial judge should have informed the jury he was parole ineligible, 2) the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," incorrectly suggested he was parole eligible, and 3) the trial judge erred by refusing to read that portion of the sentencing statute which referred to parole ineligibility. We disagree.

1.

As noted above, parole eligibility or ineligibility is not relevant to a capital jury's sentencing considerations and the issue of parole should not be injected into the jury's deliberations. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). When a *jury inquires* about parole, the trial court should instruct the jury it shall not consider parole eligibility in reaching its decision and the terms

"life imprisonment" and "death penalty" should be understood in their ordinary and plain meaning. State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).[12]

In keeping with Norris, the trial judge's supplemental instruction properly told the jury not to consider parole eligibility or ineligibility. Although Norris was decided prior to the new sentencing statute, we find no reason to require a different response when the jury inquires about parole.

Moreover, as noted above, three potential sentences were available: 1) death, 2) life imprisonment, or 3) a mandatory minimum thirty year sentence. Appellant was not eligible for parole under any of these sentences.[13] Nonetheless, as suggested by appellant, by asking for information on parole, the jury was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment. Informing the jury appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

2.

Furthermore, contrary to appellant's argument, the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," did not suggest appellant was parole *eligible*. Unlike the admonitions in Simmons v. South Carolina, 512 U.S. 154 (1994), "you are not to consider parole" and parole "is not a proper issue for your consideration," the instruction here specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole

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[12]In Ard we held the trial judge's erroneous mention of parole was harmless. To the extent Ard suggests the trial judge should charge the jury on parole eligibility if requested by the defendant, it is overruled. We note Ard was decided eight months after the present case was tried.

[13]But see footnote 7.

eligible.

3.

Finally, in response to the jury's questions, appellant requested the trial judge read that portion of the sentencing statute highlighted below:

> A person who is convicted of or pleads guilty to murder must be punished by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. **If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, 'life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.** No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

Section 16-3-20(A) (Supp. 1998).

We find no error or prejudice from the trial judge's refusal to read the highlighted portion of the statute. Again, neither parole eligibility nor parole ineligibility are proper considerations for the jury. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Furthermore, appellant's suggestion that providing the jury with the highlighted language would promote "truth-in-sentencing" is

tenuous. The highlighted text provides the jury with only those portions of the sentencing statute which appellant deems favorable but excludes any reference to other less favorable sentencing options.

We conclude the supplemental instruction was appropriate.

II.

Appellant argues he was deprived of his right to make religious arguments to the jury. We disagree.

Over appellant's objection, the trial judge granted the State's motion to prohibit references to the Bible or religion during closing argument by both the prosecution and defense. Appellant proffered several religious arguments he had considered including in his closing argument.

In his closing argument, appellant stated:

> There's a story about a woman who broke the law a long, long, long time ago. Before we had electricity, before we had lethal injection, we still had the death penalty. There was a time that she had been caught, she was caught for breaking the law, and the people in her community gathered around her, and they were going to kill her for what she had done. They had the objects they were going to use to kill her in their hands, and she stood before them. Somebody walked in and said 'I'm not denying that what she did was wrong, this isn't about what she did was wrong, this is about what statement are you going to make about being confronted with this.'
>
> The story that I referenced, a very great man discussed with them about not killing the woman, and they didn't.

We find no error in the trial judge's ruling. Previously, we have held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied 522 U.S. ___, 118 S.Ct. 146 (1997). In any event, the record clearly demonstrates appellant was not prejudiced by the trial judge's ruling. Although he was not permitted to

make all of his religious arguments, appellant conveyed the Biblical story of Jesus and the adulterous woman. State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicated he made the argument nonetheless). The trial judge did not abuse his discretion in granting the State's motion to prohibit references to the Bible or religion during both the prosecution and defense closing arguments. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986)[14] (trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed).

III.

In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.

In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).[15] Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.

Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general

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[14]Overruled on other grounds Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Casey, 305 S.C. 445, 409 S.E.2d 391 (1991).

[15]Because the General Assembly has approved the propriety of capital punishment, evidence attempting to establish its effectiveness or ineffectiveness as an instrument of deterrence is irrelevant.

deterrence. See State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied 519 U.S. ___, 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge general deterrence need not be considered); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), cert. denied 471 U.S. 1036 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatedly allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168, cert. denied 498 U.S. 1074 (1990); State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied 462 U.S. 1124 (1983), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the evidence. See S.C. Code Ann. § 16-3-25 (1985). Further, we hold the death penalty is neither excessive nor disproportionate to that imposed in similar cases. See State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997), cert. denied, 523 U.S. ___, 118 S.Ct. 1674 (1998); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. ___, 118 S.Ct. 146 (1997); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, cert. denied, 520 U.S. ___, 117 S.Ct. 2460 (1996); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52, cert. denied, 520 U.S. ___, 117 S.Ct. 2441 (1996); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied, 519 U.S. ___, 117 S.Ct. 695 (1997); State v.

Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502 U.S. 1103 (1992).

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justice Thomas C. Huff, concur. FINNEY, C.J., dissenting in a separate opinion.

FINNEY, C.J.: I respectfully dissent, and would reverse and remand for a new sentencing proceeding.

Under the 1996 amendments to S.C. Code Ann. § 16-3-20, all capital defendants face one of three sentences:

> (1) death; or
>
> (2) life in prison until death; or
>
> (3) unconditional release after service of a minimum term of thirty years, with no possibility of parole.[1]

Appellant contends that since he was parole ineligible as a matter of state law, the jury was entitled to be charged this fact when they inquired. I agree.

The majority deems the holding in Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994), inapplicable because appellant's sentencing options were not limited to death or life without

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[1]In this opinion and in State v. Starnes, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000), the Court has avoided directly deciding the parole eligibility status of a capital defendant who receives a term of years sentence. In my opinion, we must decide this question today in order to address the jury charge issues raised by appellant. The murder statute is clear as to certain defendants: "No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole. . . or any other credits which would reduce the mandatory minimum term of imprisonment for thirty years required by this section." § 16-3-20(A) (Supp. 1999). Since the murder statute is silent as to the parole eligibility of defendants receiving a sentence in excess of the mandatory minimum, the general rule controls. Under § 16-1-10(d) (Supp. 1999), murder is exempt from the classification system, and under § 24-13-100 (Supp. 1999), persons convicted of exempt offenses are ineligible for parole. Thus, although a capital defendant may receive a sentence of a term of years, he is ineligible for parole whatever the duration of that term.

possibility of parole, and cites a number of cases in support of this proposition. In all the cited cases except one, however, the defendant's sentencing possibilities included one in which he would be parole eligible. The only case in which the defendant did not face a potential parolable sentence was United States v. Flores, 63 F.3d 1342 (5th Cir. 1995). Flores involves a federal conviction, and parole has been abolished in the federal system. It is inapposite to the present South Carolina sentencing scheme, as are all the other cases cited. While I concede that Simmons does not directly control this case[2], the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal.

Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as the majority suggests in Part I C, then why not adopt a policy which gives the jurors the simply truth: no parole. The majority acknowledges, as it must,[3] that parole considerations "could" affect a jury's sentencing decision,[4] but then deems it "irrelevant" and denigrates its importance as "[a] bit of information that might possibly influence the individual juror's voting behavior." The specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth.

Of course, I would not stop with a charge that the defendant was

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[2]We are not concerned with whether a Simmons charge was warranted at the initial charge to the jury since future dangerousness was not an issue, but rather with the procedure to be followed when a capital jury inquires about parole.

[3]Given the regularity with which capital juries inquire about parole, we cannot deny its role in sentencing.

[4]See Bowers, Vandiver & Dugan, *A New Look at Public Opinion On Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J.Crim.L. 77 (1994).

not parole eligible, for that is only half the truth. I would tell the jury that if no aggravating circumstance is found, the defendant faces a minimum of thirty years without possibility of early release, but that if aggravating circumstances are found, then the alternatives are death or life in prison until death.

For these reasons, and with instructions that henceforth juries which inquire shall be charged the truth about sentencing, I would reverse and remand for a new sentencing proceeding in this matter.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent.

v.

Norman E. Starnes, Appellant.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 25119
Heard September 21, 1999 - Filed May 8, 2000

REVERSED

Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Bill Welborn and Jarrod Champlin. He maintained the shootings were in self-defense. Appellant was convicted of two counts of murder and possession of

a firearm during the commission of a violent crime. The jury found one statutory aggravating circumstance and recommended a sentence of death.[1] The trial judge sentenced appellant to death and a concurrent sentence of five years' imprisonment. We reverse.

FACTS[2]

Jody Fogle testified appellant arrived unexpectedly at his home at 10:00 p.m. on January 8, 1996. According to Fogle, appellant told him he wanted help moving some things. During the drive to appellant's home, appellant told Fogle about two men who had put a gun to his head and threatened to kill him. Fogle stated appellant demonstrated by holding a .22 gun to his head. Fogle testified he took the gun from appellant, determined it was loaded, then placed it on the car seat. A .38 revolver was on the dash of the car.

Fogle testified Welborn and Champlin were at appellant's home. He denied meeting either Welborn or Champlin previously. Fogle described Welborn and Champlin as "wired" as if on drugs. Champlin asked appellant to return his gun. Appellant gave Champlin the .22, the same gun appellant had been handling in the car. Appellant went into his bedroom; Fogle could hear appellant fumbling around in the bedroom.

Fogle testified Champlin asked him if he had a gun. Fogle responded negatively. Champlin "chambered a round" in the gun, worked the slide, came towards Fogle stating "[I'm] going to kill you and bring a__" and pointed the gun at Fogle's chest. Fogle testified he could tell Champlin was serious; he admitted, at that time, he would have shot Champlin if he had been able. Welborn told Champlin to give him the .22 and Champlin complied. A couple of seconds later, appellant shot Welborn three times with the .38 revolver.

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[1]"Two or more persons were murdered by the [defendant] by the act of pursuant to one scheme or course of conduct." S.C. Code Ann. § 16-3-20(C)(a)(10) Supp. 1998).

[2]The evidence is recited in the light most favorable to appellant.

Appellant testified Fogle had previously met Welborn. He explained while at a New Year's Eve party ten days before the shooting. Welborn asked appellant if he knew where he could get some crystal "meth," an illegal drug. Appellant stated no one at the party had the drug. Later, Fogle arrived at the party. Appellant testified Fogle had crystal methamphetamine. Appellant introduced Fogle to Welborn. He was not certain if a drug transaction occurred, but Welborn inquired if there was an automatic teller machine at the bank next door.

Appellant testified two nights before the shootings Welborn put an unknown amount of money in his pocket. Later the same evening, he returned the money to Welborn; he was unsure if he returned all of the money.

Appellant testified on January 8, 1996, he was at the restaurant he owned when Welborn and Champlin arrived. Welborn remained outside in a car. Appellant went outside and asked Welborn why he did not come inside and Welborn stated appellant owed him $40. Appellant gave Welborn $40 from the restaurant cash register and Welborn came inside the restaurant. Appellant described Welborn as "real agitated," "wired," "just acting unusual," "just full of energy." Appellant described Champlin as "hyper."

Appellant, Welborn, and Champlin left the restaurant. Appellant testified Welborn asked if appellant was afraid to die and commented about the $40. The three men went to a bar. Appellant testified Welborn was "still acting real antsy," "pacing the pool table." He thought Welborn was "coming down off of a high." Appellant described Champlin as "antsy, kind of wired, same as [Welborn] was acting, but not as bad."

Appellant stated while he was in the [illegible] at the bar, Welborn came up behind him, grabbed him around the neck, and hit him on the head with a metal object which he thought was Welborn's gun or cigarette lighter. Welborn asked again about the $40 and stated, "you'd [illegible] to your fing friends like that."

Appellant left the bar with Welborn and Champlin.[3] He testified Welborn and Champlin asked him to get them some drugs. Appellant left Welborn and Champlin at his home and went to Fogle's home. He testified he did not take Welborn and Champlin with him because Fogle had previously told him he did not want any customers at his home.

Appellant picked up Fogle and drove him to his [appellant's] home in order for Fogle to provide Welborn and Champlin with drugs. Appellant testified when he and Fogle entered his house, Welborn was on the telephone. Welborn hung up, put his arm around appellant's neck, and asked if they were going to "score." Appellant heard some noise. Champlin was cursing and pointing a gun at Fogle. Appellant testified he thought Champlin was going to shoot Fogle. He stated he had no idea why Champlin pulled a gun on Fogle.

Appellant stated he was scared and ran into his bedroom to "get away." He realized there was no exit, obtained his pistol, placed it in his back pocket, and returned to the living room in order to leave through the front door. He was opening the front door when Welborn yelled "Whoa. Where the F are you going?" Appellant turned around; Welborn was pointing a gun at him. Appellant testified he thought Welborn was going to shoot him. When he heard a "click," appellant pulled his revolver and shot Welborn multiple times. Welborn did not fire any shots.

Appellant testified he immediately thereafter shot Champlin, although he agreed he was not paying attention to Champlin and Fogle while he was in the bedroom and while he was reacting to Welborn. He testified he shot Champlin because "I thought he was going to shoot me." He admitted Champlin never pointed a gun at him. Appellant testified he did not know Champlin had given his gun to Welborn and Champlin was no longer armed. Appellant concluded he shot Welborn and Champlin "[b]ecause I thought I was going to get shot."

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[3]A waitress testified as appellant and Welborn left the bar, Welborn stated to her in front of appellant, "you need to call Lexington County because [I am going to take appellant] up on Platt Springs Road and blow his fing brains out."

GUILT PHASE ISSUES

I. Did the trial judge err by refusing to instruct the jury that, in regard to self-defense, a defendant has a right to act on appearances and does not have to wait before acting?

II. Did the trial judge err by refusing to instruct the jury on defense of others?

III. Did the trial judge err by refusing to allow the defense to question an inmate concerning allegations the prosecution had attempted to procure false testimony?

IV. Did the trial judge err by refusing to allow the defense to impeach Dawn Brudos by establishing she had a romantic relationship with Welborn?

I.

Appellant argues the trial judge erred by refusing to provide the jury with more specific instructions regarding self-defense. He contends the judge should have instructed the jury A) he had the right to act on appearances and B) he did not have to wait before shooting. We agree.

With regard to self-defense, the trial judge instructed the jury, in part, as follows:

> Self-defense is a complete defense. If established you must find the defendant not guilty. Now, in this case there are three elements that you would consider that are required by law to establish self-defense. First, first [sic], the defendant must be without fault in bringing on the difficulty. Second, he must have actually believed, actually believed [sic] that he was in imminent danger of losing his life or sustaining serious bodily injury or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, then the reasonable person of ordinary firmness and courage would have entertained the same belief. If a defendant actually was in imminent danger, then the circumstances must have been such as would warrant a

> person of ordinary firmness, prudence and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life.[4]

(Emphasis added).[5]

A.

In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), this Court held it error for the trial judge to exclusively charge the Davis instruction on self-defense when the defendant requests additional charges and the evidence supports the requests. The Court instructed the trial court to fashion an appropriate self-defense charge based on the facts and circumstances of each case.

In Fuller, the defendant requested a charge that he had the right to act on appearances. Quoting State v. Jackson, 227 S.C. 271, 278-279, 87 S.E.2d 681, 684-685 (1955), the Court set forth an appropriate charge on right to act on appearances:

> A defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had

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[4]The language is taken directly from State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).

[5]Appellant submitted written proposed jury instructions. Request to Charge No. 3 states: "If a person's right to fire in self-defense arises, he is not required to wait until his opponent is on equal terms or until his opponent has fired or aimed his weapon." Request to Charge No. 5, in part, states: "The defendant had the right to act on the appearance of things at the time, taken in light of all the evidence. One has the right to interpret the conduct of the other party in light of all of the circumstances at the time of the incident." During the charge conference, appellant stated, in addition to the standard State v. Davis, supra, self-defense instruction, he also requested the judge instruct the jury on "[a]ppearances and whatnot and so forth." The trial judge indicated the substance of appellant's proposed instructions were included in his charge.

> the right to act on appearances, and under the circumstances as they appeared to him, he believed he was in such danger and a reasonable prudent man of ordinary firmness and courage would have entertained the same belief.

State v. Fuller, supra S.C. at 443-444, S.E.2d at 331; see also State v. Gandy, 113 S.C. 147, 148, 101 S.E. 644 (1919) ("A man may act, however, from appearance, and if it turns out, if the appearances are such that a man of ordinary courage, firmness, and prudence would have been justified in coming to the conclusion that the necessity did then and there exist to strike to save himself from serious bodily harm or death that would be sufficient, although it turned out afterwards that there was no actual danger present, and that the necessity to strike did not exist.").

Appellant was not entitled to an appearance charge in regard to the Welborn shooting. According to appellant, he was in actual danger when Welborn pointed a gun at him, cursed him, and questioned him as to where he was going. Appellant's claim to self-defense did not arise from a perceived, but rather an actual threat. Since there was no evidence appellant was acting on appearances, he was not entitled to an appearance charge. See State v. Lewis, 328 S.C. 273, 494 S.E.2d 115 (1997) (defendant not entitled to insanity charge where no evidence supported the charge).

The State contends appellant was not entitled to an appearance charge with respect to the Champlin shooting because he did not testify he thought he saw a gun in Champlin's hand at the time of the shooting. We disagree.

The right to act on appearances is not limited to the situation where the defendant testifies he mistakenly thought he saw a weapon in the victim's hand. While an appearance charge is appropriate when the defendant erroneously believes he sees the victim with a weapon, it has

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See State v. Nichols, 325 S.C. 111, 481 S.E.2d 113 (1997) (where defendant testified he saw a shiny object in victim's hand and thought it was a gun, he was entitled to charge on appearances); State v. Fuller, supra (where defendant testified he saw two victims open the trunk of their vehicle and thought he saw a shiny object in one victim's hand, he was entitled to

been applied elsewhere. In State v. Jackson, supra, the defendant testified he shot the victim after being awakened in his home by an intruder and blinded by a flashlight. The defendant did not testify he saw what appeared to be a weapon in the victim's hand. In fact, the defendant testified he could not see anything. The Court held the defendant was entitled to a charge on self-defense, including language on appearances.[7]

Appellant was entitled to an appearance charge in regard to the Champlin shooting. Immediately prior to the shooting, appellant observed Champlin hold a gun to Fogle's head and threaten to shoot him, apparently because the intended drug deal, which appellant had arranged, had gone awry. Welborn then pointed a gun at appellant and threatened to kill him as he attempted to leave. Unaware Champlin had passed his weapon to Welborn when appellant was in the bedroom, appellant erroneously believed Champlin was armed and intended to kill him. The trial judge should have charged the jury appellant had the right to act on appearances.[8] State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996) (the law to be charged is determined from the evidence presented at trial). Refusal to give a requested instruction on appearances necessitates reversal. State v. Nichols, supra; State v. Fuller, supra.

B.

In charging self-defense, the trial court must consider the facts and circumstances of the case in order to fashion an appropriate charge. State v. Fuller, supra. Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is in equal [illegible]

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charge on appearances.

[7] In older cases, the reference to "acting on appearances" was [illegible] in the [illegible] of the self-defense charge [illegible] imminent danger. See State v. Pridmore, 163 S.C. 71, 161 S.E. 9 (1931); State v. Francis, 163 S.C. 182, 152 S.E. 477 (1930); State v. [illegible], 143 S.C. 311, 141 S.E. 104 (1928).

[8] Here, the jury would also have to find it was [illegible] of ordinary firmness and courage would have believed he was in [illegible] danger under the circumstances.

until he has fired or aimed his weapon in order to act. State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Similarly, "[the accused] doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant (sic) getting the drop on him." State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936).

The facts presented at trial entitled appellant to a self-defense charge in regard to both shootings. Appellant testified Welborn pointed a gun at him and he believed Champlin was armed. Appellant did not have to wait for Welborn or Champlin to fire or aim at him before acting in self-defense. Accordingly, appellant was entitled to a charge instructing the jury he did not have to wait before acting in self-defense. Refusal to charge this request was reversible error. State v. Nichols, supra (where defendant requested charge he did not have to wait before acting in self-defense and the trial court gave a common-law instruction on self-defense, refusal to give the requested charge was reversible error).

II.

Appellant argues the trial judge erred by refusing to instruct the jury on defense of others. We disagree.

Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); see also William S. McAninch & W. Gaston Fairey, The Criminal Law of South Carolina (3rd ed. 1996) ("There must, of course, be some evidence that the defendant was defending others at the time of his act in order for him to be entitled to the instruction.").

Appellant was not entitled to a charge on defense of others. Appellant testified after Champlin threatened Fogle, he went into his bedroom "to get away." He realized there was no exit, obtained his revolver, then returned to the living room to leave through the front door. At this point, Welborn verbally threatened appellant and pointed a gun at him.

Appellant specifically maintained he shot Welborn and Champlin because he thought they were going to shoot him. At no point did appellant suggest he shot either Welborn or Champlin to protect Fogle. Accordingly, he was not entitled to a charge on defense of others. See State v. Alford, 264 S.C. 26, 212 S.E.2d 252 (1975) (where defendant did not testify he was shooting for purpose other than to protect himself, he was not entitled to charge on defense of others).

III.

Appellant argues the trial court erred by refusing to allow the defense to question an inmate concerning allegations the prosecution had attempted to procure false testimony. We disagree.

Appellant testified in his own defense. On cross-examination, appellant denied while awaiting trial he told four inmates he planned to murder Welborn and Champlin, pre-dug their graves, and wanted to hire someone to kill Gwen Ott.[9] Thereafter, appellant called Chris Kopel as a defense witness. Kopel testified for several months he was appellant's cellmate in the Lexington County Detention Center. He testified an assistant solicitor met with him and asked him if he had ever heard appellant threaten Ott's life. Kopel responded negatively. The solicitor objected.

During a proffer, Kopel stated the assistant solicitor asked him if he would be willing to testify that he had heard appellant threaten Ott. Kopel believed the assistant solicitor was asking him to lie. The trial judge sustained the objection, stating appellant could cross-examine the four inmates if the State called them in reply. In reply, four inmates testified appellant told them he had planned to kill Welborn and Champlin, had pre-dug their graves, and wanted to hire someone to murder Ott. No testimony concerning actions on behalf of the Solicitor's Office or Sheriff's Department was elicited from these witnesses.

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[9] At the time of the shootings Ott was appellant's live-in girlfriend. Ott helped appellant bury Welborn and Champlin. She reported appellant's involvement in the shootings in May 1996.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE.

Kopel's testimony was irrelevant to any issue at trial. His testimony neither established the prosecution actually presented perjured testimony at appellant's trial nor impeached the testimony of the four inmates who testified in reply as he did not state the prosecution had attempted to procure false testimony from them. Moreover, the allegation the assistant solicitor attempted to procure false testimony is not relevant to the issues in appellant's trial. The trial judge did not abuse his discretion in ruling Kopel's testimony inadmissible. State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987)(admission or rejection of proffered testimony is within the sound discretion of the trial judge; absent an abuse of discretion, the ruling will not be disturbed on appeal).[10]

IV.

Appellant argues the trial court erred by refusing to allow the defense to impeach Dawn Brudos by establishing she had a romantic relationship with Welborn. We agree.

Brudos was the first witness offered at trial. She testified she had known Welborn since 1993 and worked for his skydiving business. She testified Welborn, Champlin, and Champlin's girlfriend had been living in her home since mid-December 1995. Brudos testified two nights before the shootings Welborn was upset appellant had not returned $40 to him.

On cross-examination, defense counsel asked if Brudos had a romantic relationship with Welborn at the time of his death. She answered affirmatively. The solicitor objected. Defense counsel argued the question was relevant to establish Brudos' bias. After an in camera hearing, the trial judge sustained the objection and instructed the jury to disregard the question and answer.

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[10] Allegations of improper conduct by the Solicitor's Office could be raised at a hearing on prosecutorial misconduct.

The Sixth Amendment guarantees a criminal defendant the right to meaningful cross-examination of adverse witnesses. "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose the jury to the facts from which jurors . . . could appropriately draw inferences relating to reliability of the witness.'" Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986)(emphasis added), quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 105, 111, 39 L.Ed.2d 347, 353 (1974). A trial judge, however, may impose limits on defense counsel from inquiry into the potential bias of a prosecution witness to prevent harassment, prejudice, confusion of the issues, repetitive or marginally relative examination. Id.

Rule 608(c), SCRE, also permits a party to impeach a witness by establishing bias or prejudice either through examination or otherwise. "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976), quoting 98 C.J.S. Witnesses § 560a (1957). A witness' romantic relationship with a party is a source of potential bias of which the jury should be aware in order to fully evaluate the witness' testimony. McIntyre v. State, 934 P.2d 770 (Alaska App. 1997); Orkin Exterminating Co., Inc. v. McIntosh, 452 S.E.2d 159 (Ga. App. 1994); State v. Erby, 299 S.E.2d 86 (N.C. App. 1982).

Under both the Sixth Amendment and Rule 608(c), SCRE, appellant was entitled to inquire if Brudos had a romantic relationship with Welborn. Certainly, an intimate relationship between Brudos and Welborn could affect Brudos' credibility. The trial judge erred by prohibiting appellant from making this inquiry.[11]

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[11] Although it is appropriate to perform a harmless error analysis when a party alleges he was denied the right to cross-examine a witness fully, such an analysis is unnecessary here because appellant has been granted a new trial.

SENTENCING PHASE ISSUE

V. Did the trial judge err by refusing to instruct the jury appellant was ineligible for parole?

V.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends the trial judge's refusal to instruct the jury that he was parole ineligible violated his due process rights.[12] We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. Simmons v. South Carolina, 512 U.S. 154 (1994); State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raises[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society." Simmons v. South Carolina, supra, U.S. at 165 (plurality opinion).[13]

At the time Simmons was decided, South Carolina's capital sentencing scheme provided if the jury did not find a statutory aggravating circumstance, a death-eligible defendant was sentenced to life imprisonment and eligible for parole in twenty years. If the jury found a statutory aggravating circumstance and did not recommend death, the defendant was sentenced to life imprisonment and eligible for parole in thirty years. S.C. Code Ann. § 16-3-20(A)(Supp. 1993). However, if the defendant had a prior conviction for certain violent crimes, he was ineligible for parole. S.C. Code

[12]U.S. Const. amend. XIV, cl. 1. Appellant does not allege an Eighth Amendment violation.

[13] For purposes of this discussion, we assume the solicitor placed appellant's future dangerousness in issue.

Ann. § 24-21-640 (Supp. 1993).[14]

By Act No. 83, §10, 1995 Acts 557, the General Assembly amended the sentencing options for capital murder. Effective January 1, 1996, § 16-3-20 (Supp. 1998) provides, in relevant part, as follows:

> (A) A person who is convicted of . . . murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt . . .. and a recommendation is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. . . .
>
> (B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. . . .

Emphasis added.

[14]Simmons was parole ineligible pursuant to § 24-21-640.

Under the new sentencing scheme, if the jury does not find a statutory aggravating circumstance, a death-eligible defendant may be sentenced to either life imprisonment or a mandatory minimum thirty year sentence at the discretion of the trial judge. Under either sentence, the defendant is ineligible for parole or any form of credit which would reduce the length of the sentence. However, if sentenced to the mandatory minimum sentence, the defendant would be unconditionally released from prison at the completion of thirty years.

Simmons is inapplicable under the new sentencing scheme. By its own terms, Simmons requires the jury be informed the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is legally available to the defendant. Id., U.S. at 178 (O'Connor, J., concurring)("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole. . ."(emphasis added).[15] This interpretation is supported by decisions from other jurisdictions. Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999)(Simmons is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996)(because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and, therefore Simmons is inapplicable); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108 (1995)(Simmons applies where capital defendant is ineligible for parole as a matter of law; Simmons does not apply even if it is unlikely defendant would be paroled); People v. Simpson, 665 N.E.2d 1223 (Ill.), cert. denied, 519 U.S. 982 (1996)(Simmons inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995), cert. denied, 517 U.S. 1111 (1996)(Simmons inapplicable where alternative to death is not life

[15]Keel v. French, 162 F.3d 263, 270 (4th Cir. 1998)(recognizing "that Justice O'Connor's concurrence actually represents the holding in Simmons.").

imprisonment without possibility of parole). Under the new statute, a sentence other than life without the possibility of parole is an available alternative to the death penalty.[16]

Moreover, the rationale for Simmons simply does not exist when there is a potential mandatory minimum thirty year sentence. Contrary to a sentence of life imprisonment without the possibility of parole, a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society. For this same reason the Court has repeatedly declined to apply Simmons when the defendant is parole eligible. State v. Hill, 331 S.C. 94, 501 S.E.2d 122, cert. denied, 525 U.S. ___, 119 S.Ct. 597 (1998); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, cert. denied, 520 U.S. 1277 (1996); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied, 519 U.S. 1061 (1997). Accordingly, because a mandatory minimum thirty year sentence was a legally available sentence, appellant's due process was not violated when the trial judge refused to instruct the jury appellant was parole ineligible.[17]

Additionally, appellant argues because the jury had already convicted him of two murders, it was bound to find the statutory aggravating circumstance of "two or more persons murdered by the defendant by one act or pursuant to one scheme or course of conduct" and, therefore, the only available sentence alternative to death was life without the possibility of parole. We find it inappropriate to assume the jury will find a statutory aggravating circumstance. Appellant's jury could have concluded that while appellant murdered Welborn and Champlin, the two murders were not

[16]The dissent contends the cases cited herein are inapposite. As explained in State v. Shafer, Op. No. 25120 (S.C. Sup. Ct. filed May 8, 2000 (Shearouse Adv. Sh. No. 18 at 35), each of the referenced cases fully support the conclusion due process did not require the trial judge to instruct the jury appellant was parole ineligible.

[17]Further, we note the sentencing statute provides for a mandatory minimum thirty year sentence. Based on the language of the statute, it is arguable a defendant sentenced to more than thirty years is eligible for parole after service of thirty years.

pursuant to one scheme or course of conduct beyond a reasonable doubt. Because the jury could have failed to find the existence of a statutory aggravating circumstance, a potential mandatory minimum thirty year sentence existed and appellant was not entitled to a charge on parole ineligibility. United States v. Flores, supra (district court did not violate the principles of Simmons by refusing to inform the jury the defendant would be sentenced to life imprisonment without possibility of parole because a lesser sentence, dependent on the jury's findings, was available).

REVERSED.

TOAL, MOORE, JJ., and Acting Justice William T. Howell, concur. FINNEY, C.J., dissenting in a separate opinion.

FINNEY, C.J.: I respectfully dissent from the majority's opinion insofar as it holds appellant was not entitled to a jury charge that he was parole ineligible pursuant to Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994). As I explained in my dissent in State v. Shafer, Op. No. 25120, (S.C. Sup. Ct. filed May 8, 2000) **all** capital defendants are now parole ineligible under the 1996 amendments to S.C. Code Ann. § 16-3-20 (Supp. 1999). Appellant thus meets the two prerequisites for a Simmons charge: (1) parole ineligibility and (2) argument regarding future dangerousness. All the state cases cited by the majority as supporting its decision not to apply Simmons are distinguishable because in each the defendant faced a potentially parolable sentencing option under state law. The decision in United States v. Flores, 63 F.3d 1342 (5th Cir. 1995) is simply unhelpful since parole has been abolished in the federal system. For these reasons, and the reasons given in my Shafer dissent, I would reverse the denial of appellant's request for a Simmons charge.

in three specific areas." State v. Cooper (S.C. 1998) 334 S.C. 340, 514 S.E.2d 584

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for [illegible] mitigating circumstances otherwise authorized or allowed by law and

the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;

(h) physical torture; or

(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for

thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

HISTORY: 1985 Act No. 104, § 1, eff May 21, 1985; 1986 Act No. 462, § 27, eff June 3, 1986; 1990 Act No. 604, § 15, eff June 25, 1990; 1992 Act No. 488, § 1, eff July 1, 1992; 1995 Act No. 83, § 10, eff January 1, 1996; 1996 Act No. 317, § 1, eff May 20, 1996.

Editor's Note—

1990 Act No. 604, § 17, eff June 25, 1990, provides as follows:

"This act takes effect upon approval by the Governor. A person arrested, charged, or indicted under those provisions of law amended by this act must be tried and sentenced and any administrative penalty or suspension exacted as provided by the law in force at the time of the commission of the crime."

Effect of Amendment—

The **1985** amendment rewrote subsection (A) to provide that when a sentence of death is commuted, the commutee is not eligible for parole.

The **1986** amendment made grammatical changes; revised subsection (A) by adding the provision relative to the sentence to be imposed when an aggravating circumstance is found beyond a reasonable doubt but a recommendation of death is not made, and by substituting "mandatory imprisonment" for "mandatory twenty years' imprisonment" in the last sentence; revised subsection (B) by substituting "trial by jury" for "the trial jury", and by substituting "the sentence to be imposed" for "the sentence of death" and for "the sentence imposed"; revised subsection (C) by rewriting subitem (a)(7), by adding subitems (a)(8) and (9), and by adding the provisions relative to juries which do not recommend death despite finding an aggravating circumstance beyond a reasonable doubt, questioning the jury, prior to its dismissal, as to whether it found an aggravating circumstance beyond a reasonable doubt, and designation of such a finding in a writing signed by all members of the jury; and revised subsection (E) by substituting "verdict according to law" for "verdict of guilty according to law".

The **1990** amendment revised subsection (C)(a).

The **1992** amendment, in subsection (C), item (b), added subitem (10).

The **1995** amendment substantially revised this section.

The **1996** amendment in subsection (C), item (a), added subitem (11).

Cross References—

Commission of this crime within specified radius of child day care center as separate offense, see § 20-7-3093.

Governor's power to commute sentences, see the South Carolina Constitution, Article IV, § 14.

Final judgment from the circuit court involving a sentence under Article I of this chapter is not to be transferred to the Court of Appeals, see Rule 214, SCACR.

Research and Practice References—

13 Am Jur 2d, Burglary § 73.5.